Supreme Court, U.S.
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No. 95-1456

In The

Supreme Court of the United States

October Term, 1995

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SPARKY'S WATERFRONT SALOON, INC.,

Petitioner,

-against-

COSMOPOLITAN, INC.; H.E. LOCKHART MANAGEMENT, INC., as Successor in interest by merger of LOCKHART DEVELOPMENT CORP.; ARTHUR WITTY, Individually; ARTHUR WITTY REAL ESTATE; ST. THOMAS HISTORICAL TRUST; DEJONGH ASSOCIATES; ROBERT C. DEJONGH; ARMOUR ENTERPRISES, INC.; TOPA EQUITIES (VI) LTD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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95 pp

QUESTIONS PRESENTED

1. Does a litigant's right to a mentally competent jury, as secured under the Constitution and 28 U.S.C. §1865(b)(4), require that a court overturn a jury verdict where the court has found that a juror suffered from a psychotic illness and was delusional at the time of trial?

2. Where a court has determined that it must assess the competency of a juror, and where the court's appointed expert psychiatrist has stated that he cannot assess the juror's competency during the relevant time period without first examining the juror, does the court have a duty to order the juror to submit to a psychiatric examination?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Juror #8 4

B. The Court's Findings in the Absence of a Psychiatric Examination..... 6

REASONS FOR GRANTING THE PETITION 8

I. A Juror Who is Delusional at the Time of Jury Service is Not Mentally Competent to Sit as a Juror 8

II. The Court's Refusal to Order a Psychiatric Examination Prevented Its Own Expert from Rendering the Opinion for Which He Was Retained 11

TABLE OF CONTENTS (continued)

Page

III. It Is Important that this Court Address these Issues 13

CONCLUSION 16

APPENDIX A - Judgment Order of the United States Court of Appeals for the Third Circuit (December 8, 1995) 1a

APPENDIX B - Findings of the United States District Court for the District of the Virgin Islands, Division of St. Thomas and St. John, Rendered January 25, 1995 ..... 3a

APPENDIX C - Order of the United States District Court for the District of the Virgin Islands, Division of St. Thomas and St. John, Filed January 25, 1995 ..... 18a

TABLE OF CONTENTS (continued)

		Page
APPENDIX D -	Interim Decisions and Colloquy Regarding the Procedures to be Followed in Assessing Juror Competency, the Propriety of Ordering a Psychiatric Examination, and the Standard of Juror Competency (January 4, 1995)	19a
APPENDIX E -	Interim Decisions and Colloquy Regarding the Mental Competence of Juror #8 (January 13, 1995)	28a
APPENDIX F -	Interim Decisions and Colloquy Regarding Procedures to be Followed in Assessing Mental Competency, Retaining an Expert Psychiatrist, and the Possibility of Conducting a Psychiatric Examination of Juror #8 (January 17, 1995)	33a
APPENDIX G -	Interim Decisions and Colloquy Regarding the Standard of Juror Competency, the Propriety of Ordering a Psychiatric Examination of a Juror, and	

TABLE OF CONTENTS (continued)

		Page
	Procedures to be Followed (January 18, 1995)	39a
APPENDIX H -	Interim Decisions and Colloquy Regarding the Use of a Psychiatric Expert, and the Court's Thoughts Regarding Juror Competency (January 18, 1995)	50a
APPENDIX I -	Interim Decisions and Colloquy Regarding the Standard of Juror Competency and the Purpose of Retaining an Expert Psychiatrist (January 21, 1995)	52a
APPENDIX J -	Answers to Written Questions Propounded to Juror #8, Sworn to on January 13, 1995	57a
APPENDIX K -	Expert Psychiatrist's Written Opinion Regarding the Competency of Juror #8	65a

TABLE OF AUTHORITIES

Cases Cited: Page

Eisen v. Picard, 452 F.2d 860 (1st Cir. 1971), *cert. denied*, 406 U.S. 950 (1971) 10

Haley v. Blue Ridge Transfer Co., 802 F.2d 1532 (4th Cir. 1986) 15

Jordan v. Massachusetts, 225 U.S.167 (1912) ..... *passim*

Mattox v. United States, 146 U.S. 140 (1892) 11

Marriage of Kutchins, Matter of, 136 Ill.App.2d 45, 482 N.E.2d 1005 (Ill. App. 2d Dist. 1985) 9

Peterman v. Indian Motorcycle Co., 216 F.2d 289 (1st Cir. 1954) 14

Peterson, Ex Parte, 253 U.S. 300 (1920) 12

State v. Butler, 27 N.J. 560 (1958) 12

Sullivan v. Fogg, 613 F.2d 465 (2d Cir. 1980) ..... *passim*

Tanner v. United States, 483 U.S. 107 (1986) 14, 15

United States v. Auen, 846 F.2d 872 (2d Cir. 1988) 10

United States v. Benn and Hunt, 476 F.2d 1127 (D.C. Cir. 1973) 12

TABLE OF AUTHORITIES (continued)

Cases Cited (continued): Page

United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974), *cert. denied*, 419 U.S. 873 (1974) .. 8, 14

United States v. Hall, 989 F.2d 711 (4th Cir. 1993) .. 8

United States v. McVean, 436 F.2d 1120 (5th Cir. 1971), *cert. denied*, 404 U.S.822 (1971) 9

Zirt v. Pollock, 270 N.Y.S.2d 85 (N.Y. App. Div. 3d Dep't 1966) 11

Statutes Cited:

28 U.S.C. §1865(b)(4) 2, 8

48 U.S.C. §1612 3

4 V.I.C. §32(a) 3

United States Constitution
Fifth Amendment 2, 15

Seventh Amendment 2, 15

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SPARKY'S WATERFRONT SALOON, INC.,
Petitioner,

v.

COSMOPOLITAN, INC.; H.E. LOCKHART MANAGEMENT, INC., as Successor in interest by merger of LOCKHART DEVELOPMENT COPP.; ARTHUR WITTY, Individually; ARTHUR WITTY REAL ESTATE; ST. THOMAS HISTORICAL TRUST; DEJONGH ASSOCIATES; ROBERT C. DEJONGH; ARMOUR ENTERPRISES, INC.; TOPA EQUITIES (VI) LTD, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Sparky's Waterfront Saloon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (App., *infra*, 1a-2a) has not been published. The decisions of the district court (App., *infra*, 3a-17a, 18a) are unreported.

JURISDICTION

The court of appeals entered its judgment on December 8, 1995 (App., *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

The Fifth Amendment to the United States Constitution provides, in relevant part:

> . . . [N]or [shall a person] be deprived of life, liberty, or property, without due process of law.

The Seventh Amendment to the United States Constitution provides, in relevant part:

> In suits at common law . . . the right of trial by jury shall be preserved. . . .

B. Statutory Provision

28 U.S.C. § 1865(b)(4), setting forth the qualifications for jury service, provides, in relevant part,

that the court:

> shall deem any person qualified to serve on grand and petit juries in the district court unless he . . . is incapable, by reason of mental or physical infirmity, to render satisfactory jury service.

STATEMENT OF THE CASE

Petitioner, Sparky's Waterfront Saloon, Inc. ("Sparky's"), sued the respondents in the United States District Court for the District of the Virgin Islands, invoking jurisdiction pursuant to the Revised Organic Act of 1954, 48 U.S.C. §1612, and 4 V.I.C. §32(a). Sparky's alleged that respondents' negligence in constructing a wooden trellis across a fire-break alleyway caused a fire to spread from a building on the other side of the alley, across the trellis, and into Sparky's, leading to the destruction of Sparky's restaurant. Answering special interrogatories, the jury found that all respondants were negligent, but that their negligence was not a proximate cause of the fire inside Sparky's.

Four months later, one of the jurors at the trial, Juror Number 8 ("Juror #8"),[1] came forward with

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[1]Petitioner will refer to the juror in question as Juror #8 throughout this petition in order to preserve the juror's anonymity. In addition, petitioner will adopt the use of the male pronoun when referring to Juror #8; such use of the male pronoun is not intended to convey any information about Juror #8's sex. (The Third Circuit entered an order sealing so much of the record as related to Juror #8.)

allegations that another juror had been bribed by one of the respondents. The district court requested, and was conferred, jurisdiction from the Third Circuit to conduct post-trial proceedings inquiring into these allegations. During the course of this inquiry, the court became aware that Juror #8 suffered from delusions and might not have been competent at the time of jury service. Accordingly, the court broadened the scope of the post-trial proceedings to inquire into the issue of juror competence.[2]

A. Juror #8

An FBI agent interviewed Juror #8 as part of the investigation into the allegations of jury tampering. Juror #8 told the agent that the jurors were afraid to render a verdict against the respondents because they were "powerful business people in the community and members of a 'secret society' . . . identified as the 'Masons'." (R. A3840).[3] Juror #8 stated in the same interview that he had been able to infiltrate Mason meetings because he has "special powers" that enable him to make himself disappear; his other powers included being able to "go through walls and to be able to fly." (R. A3845-67). Juror #8 claimed that "these powers result from reciting ancient [E]gyptian chants from the book of 'M'." (R. A3846).

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[2]The allegations of jury tampering were ultimately determined to be unsubstantiated.

[3]Throughout this petition, the notation "R. ___" shall be used to denote references to the Appendix filed with the Third Circuit.

The district court found the FBI report sufficiently disturbing to initiate further inquiry into the mental competency of Juror #8. The court appointed counsel to represent Juror #8, and then presented him with a list of written qustions to be answered under oath. (R. A3920, A3926, A3929, A3931, A3936-37, A3941-43, A4281-82). The questions, which had been drafted by Sparky's counsel, inquired into Juror #8's background and alleged powers. (R. A4281-82).

Juror #8's answers further explained the "powers" he had revealed to the F.B.I. agent. (App., *infra*, 57a-64a). He stated that he has known about his special powers, which were acquired through "descent or inheritance," since he was "about 8 years of age." (*Id.* at 58a-59a). He stated that he is able to fly, make himself "to be unseen," and "to modify the atomic structure of [his] body to pass through what appear to be solid structures." (*Id.* at 58a-60a). He elaborated on his infiltration of organizational meetings, stating that he has infiltrated "All groups, whenever and wherever they meet." (*Id.* at 63a). Among the thirteen groups he listed as groups he has infiltrated in the past was the St. Thomas Historical Trust, one of the respondents in this case. (*Id.*). When asked whether he had other powers as well, Juror #8 replied, "None that I wish to speak of." (*Id.* at 61a).

Juror #8's responses to the written questions also suggested that he was well educated and had held responsible positions. Among the institutions he claimed he had attended were Boston University, the Juilliard School of Music, and the Sloan Business School at Stanford University. (*Id.* at 61a). He claimed that he had

worked for IBM and that he had spent five years as a professor of music at Boston University. (*Id.*) These responses were consistent with the statement he had made more than a year in advance of trial, in a juror questionnaire, that he had completed 28 years of schooling. This convinced the court that further inquiry into Juror #8's competence was not necessary. (*Id.* at 30a-31a).

Several days later the court was presented with letters from almost all of the schools and employers that Juror #8 claimed he had attended; none of the institutions had ever heard of him. The court reversed its earlier decision and ordered that the inquiry into Juror #8's competence continue. (R. A4416-21, A4437-43).

B. The Court's Findings in the Absence of a Psychiatric Examination

Based on its realization that this was not merely a juror with unorthodox beliefs but, rather, a juror who appeared to be severely delusional, the court began to prepare for a psychiatric examination of Juror #8. The court retained an expert psychiatrist, Dr. Bruce Berger, who was available to conduct an examination in the Virgin Islands, and contacted Juror #8's appointed counsel to request that she and Juror #8 appear in court once again. (R. A4437-49, A4458-64, A4521-22, A4637-38).

By the time Juror #8 and his counsel were able to appear, the court had already determined that it did not have the power to order a juror to submit to a psychiatric examination, stating "I cannot find any authority for it." (App., *infra*, 46a-47a, R. A4538). Accordingly, when Juror #8 refused to voluntarily consent to an examination,

the court simply gave Dr. Berger the available documentary evidence regarding Juror #8's competence, along with relevant case law, and asked the expert to render an opinion as to whether Juror #8 was mentally competent at the time of jury service. (R. A4588-89, A4608-13, A4616-17).

Based on this secondary evidence, the court-appointed expert determined that Juror #8 was suffering from "multiple delusional beliefs of both a grandiose and paranoid quality that are consistent with a diagnosis of a major psychotic mental disorder," and that Juror #8 was not competent at the time he responded under oath to the written questions propounded by the court. (App., *infra*, 67a-70a). However, the expert was not able to determine, based on the documentary evidence available to him, whether Juror #8 was competent at the time of trial. The expert stated - both in his report and upon cross-examination - that he would need to examine the juror to make such a determination. (*Id.* at 70, R. A4699-4701).

The court refused to entertain the possibility of ordering Juror #8 to submit to a psychiatric examination and proceeded to make determinations regarding Juror #8's competency at the time of trial without securing an opinion from the expert it had retained for that purpose. (App., *infra*, 3a-17a, R. A4701-03). While accepting the fact that Juror #8's illness and "mental diseases" were present "throughout the trial of this case," and the fact that the symptoms of his illness included grandiose delusions, the court nonetheless found that Juror #8 was competent to sit as a juror. (App., *infra*, 10a-12a, 14a-15a).

REASONS FOR GRANTING THE PETITION

I. A Juror Who is Delusional at the Time of Jury Service is Not Mentally Competent to Sit as a Juror

The district court found that Juror #8 was delusional at the time of jury service. The juror's delusions included the beliefs that he could pass through walls, read minds and infiltrate meetings, and that the respondents were "powerful" members of a secret society. Nonetheless, the court concluded that this juror was competent to sit on a jury and render an impartial verdict. This was error.

Although 28 U.S.C. § 1865(b)(4) requires that a juror be mentally capable of rendering jury service, it sets forth no definition or criteria of what constitutes mental capacity. 28 U.S.C. §1865(b)(4). The clearest guidance was issued by this Court in *Jordan v. Massachusetts*, 225 U.S.167 (1912), when it stated that the ability "to arrive at a rational conclusion" is an essential ingredient of jury service. *Id.* at 173. *See also United States v. Hall*, 989 F.2d 711, 714 (4th Cir. 1993) quoting *United States v. Dioguardi*, 492 F.2d 70, 78 (2d Cir. 1974), *cert. denied*, 419 U.S. 873 (1974) ("verdict must be set aside if the defendant presents 'clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service'"); *Sullivan v. Fogg*, 613 F.2d 465, 467-68 (2d Cir. 1980) (juror's auditory hallucinations during trial raised question of competency sufficient to warrant setting aside jury's verdict).

Despite the district court's numerous comments about the lack of a test for juror competency and the need

for the court to determine what the standard is, it never set forth with any precision the criteria that should be used to determine whether a juror was mentally competent to sit at trial. (App., *infra*, 26a-27a, 39a-44a, 50a-51a, 52a-56a, 11a-15a). Instead, the court observed that while Juror #8 might not be sufficiently competent to be entrusted with the custody of minor children, he was not so ill as to be institutionalized or adjudicated incompetent to handle his own bank account. Having said that, the court determined that an individual such as Juror #8, who "has significant difficulty in at least some areas in differentiating reality from fantasy" (App., *infra*, 69a), is nonetheless competent to serve as a juror. (App., *infra*, 11a-15a).

The court's apparent reliance on standards of competency designed to prevent an individual with a mental illness from being needlessly deprived of her liberty set too low a threshold for jury service. The Constitution requires more of a juror than the ability to avoid being declared incompetent to handle her own affairs; indeed, it requires that she be able to sit in judgment of the affairs of others. *Cf. United States v. McVean*, 436 F.2d 1120, 1122 (5th Cir. 1971), *cert. denied*, 404 U.S.822 (1971)("it has never been thought that federal juries must be drawn from a cross-section of the *total* population without the imposition of any qualifications").

Courts have routinely used different tests to determine mental competence; the appropriateness of a given test depends on the context of the competency assessment. *See, Matter of Marriage of Kutchins*, 136 Ill.App.2d 45, 482 N.E.2d 1005, 1006-07 (Ill. App. 2d

Dist. 1985) ("'the rule for establishing the degree of insanity must of necessity vary, depending, as it must, upon the object or purpose for which the insanity is to be proved. . . . What might be regarded insanity or mental incapacity in the one case would not necessarily be insanity in another'"). *See, e.g., United States v. Auen*, 846 F.2d 872, 878 (2d Cir. 1988) ('"some degree of mental illness cannot be equated with incompetence to stand trial'"); *Eisen v. Picard*, 452 F.2d 860, 865 (1st Cir. 1971), *cert. denied*, 406 U.S. 950 (1971) ("'[a]n insane person is not necessarily an incompetent witness'"). By focusing on tests used to determine whether an individual should be confined, adjudged incompetent, or otherwise deprived of her liberty, the court set a standard that overlooked the critical question of whether Juror #8 was able "to arrive at a rational conclusion." *Jordan v. Massachusetts*, 225 U.S. at 173.

The court accepted Dr. Berger's conclusion that Juror #8 was delusional, and additionally found that those delusions and "whatever" illnesses he may have - illnesses described by Dr. Berger as most likely "schizophrenic" and "psychotic" - were present throughout the course of trial. In doing so, the court found that Juror #8 was, by definition, not rational. Nonetheless, the court held that this individual was competent to serve as a juror. Such a decision - and such a standard of juror "competency" - ought not be allowed to stand. The Court should grant certiorari to correct this error and set a proper standard.

II. The Court's Refusal to Order a Psychiatric Examination Prevented Its Own Expert from Rendering the Opinion for Which He Was Retained

In appointing an expert psychiatrist for the purpose of examining Juror #8, or at least reviewing evidence regarding Juror #8's mental competency during jury service, the district court acknowledged its own lack of expertise in the area of mental illness. But when the court's expert stated that he would be unable to make such a determination without conducting a psychiatric examination, the court refused to order the juror to submit to an examination and instead substituted its own admittedly unqualified, lay judgment. By refusing to fulfill its obligation to provide its expert with all the appropriate and available evidence within its power, including a psychiatric examination, the district court failed to make its procedures comport with due process.

While a district court has the discretion to conduct a hearing as it sees fit, it must still ensure that its procedures guarantee due process. *Sullivan v. Fogg*, 613 F.2d at 467-67. Accordingly, a court may not arbitrarily permit some evidence to be heard yet preclude other evidence or means of obtaining evidence that would be more probative than any other type. *Cf. Zirt v. Pollock*, 270 N.Y.S.2d 85, 87-88 (N.Y. App. Div. 3d Dep't 1966) ("expert testimony without personal knowledge is the 'weakest and most unreliable kind of evidence in respect to the sanity or insanity of the person inquired about'"). This is especially the case when the subject of the hearing affects not only the rights of the parties, but the integrity of the justice system as well. *Mattox v. United States*,

146 U.S. 140, 149 (1892) ("[no] ground of suspicion that the administration of justice has been interfered with [can] be tolerated").

Throughout the post-trial proceedings the district court expressed "grave doubts" that it had the power to order a juror to submit to a psychiatric examination, and indeed correctly noted that no existing judicial decision expressly authorized such an act. (App., *infra*, 46a-47a, R. A3920, A4701) Existing case law strongly suggests, however, that a court does have the power to order a psychiatric examination under these circumstances. *See Ex Parte Peterson*, 253 U.S. 300, 312 (1920) ("[c]ourts have [the] inherent power to provide themselves with appropriate instruments required for the performance of their duties"); *United States v. Benn and Hunt*, 476 F.2d 1127, 1130 (D.C. Cir. 1973) ("[t]o assist the court in making competency decisions . . . the trial judge may order a psychiatric examination" of a non-party witness); *State v. Butler*, 27 N.J. 560, 601 (1958) (in absence of rule specifically authorizing trial court to compel witness to undergo psychiatric examination, "the inherent power of the trial court . . . to issue a subpoena for that purpose is adequate"). Indeed, the Second Circuit in *Sullivan v. Fogg* presumed that the court had that right. *Id.* at 468 (psychiatric examination of a juror conducted more than six years after he sat during trial "would be of little, if any, value" to the determination of juror's competency).

Petitioner is not suggesting that courts routinely grant psychiatric examinations of jurors, or that such examinations should be undertaken lightly. However, where the court has deemed it necessary to ask a juror to submit to a psychiatric examination voluntarily, and where

the expert appointed to determine whether the juror was mentally competent at the time of jury service has stated that he is unable to make that determination without examining the juror, the resultant power to compel the juror to undergo the examination must necessarily follow.

It was improper for the district court to deny its expert the opportunity to examine Juror #8, making it impossible to achieve the "thorough and accurate factfinding" required in post-trial proceedings. *Sullivan v. Fogg*, 613 F.2d at 468. Even though the evidence of Juror #8's incompetence was mounting with each additional step taken in the proceedings, the district court cut the process short and prevented the inquiry from accomplishing its very purpose. Accordingly, this Court should grant Sparky's petition in order to clarify the process that must be followed in post-trial proceedings and correct the Third Circuit's error.

III. It Is Important that this Court Address These Issues

A jury system is meaningless if there is no requirement that jurors be competent and capable of understanding and rationally assessing the evidence presented to them. But existing law provides courts with virtually no guidance in determining whether or not an individual is mentally competent to serve as a juror. While a recent adjudication of insanity might indicate that an individual is not competent to sit as a juror,[4] the

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[4]Cases which have addressed the significance of a recent adjudication of incompetence did so in the context of what must be

(continued...)

standard for such an adjudication is, for good reason, set extremely high. An individual may have little ability to differentiate between reality and fantasy, yet not be adjudicated incompetent. There is, or should be, little doubt that such an individual is not qualified to sit on a jury.

It is important that the Supreme Court articulate a more definitive standard for juror competence, or at the very least make it clear that the ability "to reach a rational conclusion," as set forth in *Jordan*, cannot be assumed simply because a juror has had the good fortune never to have been declared incompetent and confined to an institution. Failing that, the test for competency will continue to vary from court to court, and inevitably there will be occasions, as happened here, when courts illogically dismiss uncontroverted evidence of delusional and psychotic thought processes as insufficient proof of unfitness to serve as a juror.

Emphasizing rationality as the touchstone of juror competence will not invite harassment of jurors by disappointed litigants and open the floodgates to post-verdict inquiries. As this Court held in *Tanner v. United States*, 483 U.S. 107 (1986) post-verdict inquiries are not

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[4](...continued)
shown to initiate a post-trial proceeding, not what must be shown to establish that a juror was not competent. *See, e.g., United States v. Dioguardi*, 492 F.2d 70, 79 (1974); *Peterman v. Indian Motorcycle Co.*, 216 F.2d 289, 293 (1st Cir. 1954). In the present case, the court itself saw the need to include an assessment of Juror #8's competence in a post-trial proceeding that was already underway.

to be undertaken lightly, and they must not delve into and expose the jury's deliberative process. *Id.* at 116-127. However, in an instance, as here, where the court finds compelling reason to inquire into the competency of a juror and to expand an existing post-trial hearing to include that issue, it is important for the court to know exactly what it is assessing and to adopt the best means available to reach a supportable conclusion.

Appointing a psychiatric expert to evaluate the competency of a juror without the benefit of an examination is a futile half-measure, like asking a biologist to evaluate the structure of a cell without the aid of a microscope. The district court attributed its reluctance to take the necessary step in this case to the absence of clear judicial authority permitting it. An explict ruling that courts have the authority (and indeed, in some cases, an obligation) to order a juror to submit to a psychiatric examination would not conflict with *Tanner*'s holding regarding the inadmissibility of juror testimony to impeach a jury verdict. A psychiatric examination is not "testimonial" in nature and, moreover, need not probe specifically into what a juror's thoughts and mental processes were during deliberations, or even while sitting at trial.

Every litigant has a right to a competent jury.[5] In the absence of clear precedential authority, each individual

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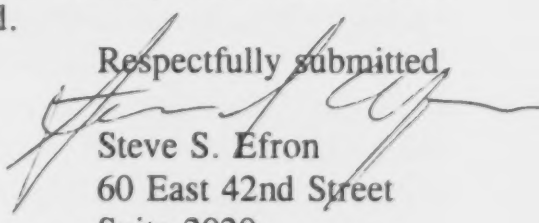
[5]The fifth and seventh amendments to the Constitution guarantee a civil litigant's right to an impartial and competent jury. *See Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912); *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir. 1980); *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535 (4th Cir. 1986).

court is free to define the concept of a "competent juror" as it sees fit - whether that definition exludes individuals whose thinking processes are clear and rational, or encompasses individuals who are incapable of differentiating fantasy from reality. It is crucial that the Court use this opportunity to announce a standard of mental competency for a juror that can be uniformly interpreted and enforced by lower courts, and to enumerate the powers a court has and the procedures it should utilize in making competency determinations. Accordingly, the Court should grant this petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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March 7, 1996

No. _____

In The

Supreme Court of the United States

October Term, 1995

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SPARKY'S WATERFRONT SALOON, INC.,

Petitioner,

-against-

COSMOPOLITAN, INC.; H.E. LOCKHART MANAGEMENT, INC., as Successor in interest by merger of LOCKHART DEVELOPMENT CORP.; ARTHUR WITTY, Individually; ARTHUR WITTY REAL ESTATE; ST. THOMAS HISTORICAL TRUST; DEJONGH ASSOCIATES; ROBERT C. DEJONGH; ARMOUR ENTERPRISES, INC.; TOPA EQUITIES (VI) LTD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX

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Appendix A - Judgment Order of the United States Court of Appeals for the Third Circuit (December 8, 1995) [Pages 1a - 2a]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-7508 and 95-7124

SPARKY'S WATERFRONT, SALOON, INC.,

Appellant,

v.

COSMOPOLITAN, INC.; H.E. LOCKHART MANAGEMENT, INC., as Successor in interest by merger of LOCKHART DEVELOPMENT CORP.; ARTHUR WITTY, Individually; ARTHUR WITTY REAL ESTATE; ST. THOMAS HISTORICAL TRUST, INC.; DEJONGH ASSOCIATES; ROBERT C. DEJONGH; ARMOUR ENTERPRISES, INC.; TOPA EQUITIES, (VI) LTD,

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On Appeal From the District Court of the Virgin Islands
(Division of St. Thomas and St. John)
(D.C. Civ. No. 91-00059)
District Judges: Honorable John P. Fullam
and Honorable Frank A. Kaufman

Argued December 4, 1995

BEFORE: GREENBERG and MCKEE, Circuit Judges,
and ACKERMAN, District Judge*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

---

* Honorable Harold A. Ackerman, Senior Judge of the United States District Court of the District of New Jersey, sitting by designation.

Appendix A

ADJUDGED and ORDERED that the orders of the district court from which the appeals have been taken, be and are hereby affirmed.

Costs taxed against appellant.

BY THE COURT:

_____
Circuit Judge

ATTEST:

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P. Douglas Sisk, Clerk

DATED: December 8, 1995

Appendix B - Findings of the United States District Court for the District of the Virgin Islands, Division of St. Thomas and St. John, Rendered, January 25, 1995 [Pages 3a - 17a]

IN THE DISTRICT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Sparky's Waterfront Saloon, Inc., :
:
v. :
:
H.E. Lockhart Management, ET AL.: :

FINDINGS OF THE COURT

THE COURT: I have no question at all in my opinion with regard to the pending issues before this Court. There is before this Court at this time a motion by the plaintiff for a new trial. The original motion for a new trial that was filed before, well before, November of 1994 was based on grounds that were indicated, and that motion was denied by this Court.

With regard to all matters that have come up since November, the first -- let's say of 1994 -- they include, to start with, a motion for a new trial by plaintiffs. That was originally the first ground, that had to do with jury tampering. The initial investigation in this case had to do with jury tampering.

This Court is more than satisfied by the FBI report and by my interview on the record with the FBI report and by my interview on the record with the FBI agent that those tampering and related accusations and allegations are without substance, and that there was -- and on the basis of the record before this Court, this Court finds no evidence of jury tampering or of anything close to that.

There was an additional ground that Mr. Arthur Rosenbaum and plaintiff's counsel came forward with, with regard to alleged influences on the jurors, et cetera, that were a whole bunch of general kind of allegations or some specific allegations. And in those regards, this Court finds them without merit and the motion to strike on that ground is denied.

That leaves us with the competency issue, which is a closer issue. This Court is clearly and definitely of the opinion that under the case law and in the context of this case, both factual and legal, this Court could have exercised its discretion not to have engaged in any inquiry whatsoever.

Therefore, the Court need not have gone forward with the questionnaires which contained the questions which Mr. Rosenbaum wanted put not only to Mr. Wallace, but to Mr. Skoff and to the other juror, Mr. Stevens.

But the Court did exercise its discretion to exercise such inquiry. As I have told defense counsel more than once, the Court thinks, not only thinks but concludes and continues to conclude and confirms, that in the opinion of this Court, this Court had discretion to permit the inquiries that this Court has permitted.

I think that they have been accomplished in the context of secrecy and confidentiality, and I -- Dr. Burger, I want him to understand clearly that all of this is secret and that all the record with regard to his participation is sealed and everything in connection with what went on today and what happened in writing that relates to Dr. Burger is sealed, and counsel understand their obligation in these regards, and I understand that their respective clients understand their obligation in these regards.

The fact that this Court has been told by Magistrate Judge Barnard that this court staff has been around for years, and is pretty close to the ground, and Miss Jackson, deputy clerk of this court, has been around for years, no word of these matters seems to have gotten around. All that anybody knows is there have been certain posttrial discussions and motions in connection with Sparky's.

So, I think we have been able to accomplish what this Court thought should be accomplished, without in any way causing any denigration of the jury system generally or specifically in this

jurisdiction, and without embarrassing any of the persons involved in this case, parties, persons alleged to have done anything wrong, persons, any of the jurors, and of course, one juror, Mr. Wallace, without unduly embarrassing Mr. Wallace.

I think the slight inconvenience to Mr. Wallace, to Mr. Stevens and to Mr. Skoff has well been balanced, something that does not outweigh the balance of the Court, in the Court having conducted or allowed the counsel and/or the Court jointly to conduct the proceedings going on in this case.

That brings me to the question of competency.

I have heard what Mr. Arthur Rosenbaum has had to say about the verdict sheets. I do not think that the fact that the jury went on to answer those additional questions caused any harm whatsoever in the case, and that kind of occurrence is not, I find, unusual. I have found verdict sheets of this kind, similarly composed, and instances where jurors have gone on to answer questions they didn't need to answer.

I agree with Mr. Douglas Capdeville and disagree with Mr. Rosenbaum, and I have no question and I so find, and I find beyond a reasonable doubt, that when the trial ended and Mr. Wallace stood up as the foreman, he was clear, he seemed to be under complete control, and I had the same impression then that I had throughout the trial

and that I had in his appearances here within the last couple of weeks, that this was a man who seemed to be under control.

I recognize fully that it is this Court that has to make the determination of competency, and I must make the determination of competency based upon the record in this case, and I must make it in the light of the prevailing standards.

I have just stated something incorrectly. The determination is whether or not the plaintiff has shown incompetency during the relevant time frame, and one or more of defense counsel had pointed that out. The burden is on the plaintiff. The burden is clearly on the plaintiff.

I know of no case that says exactly what the burden of proof standard is that is applicable in this situation. If it is -- it may be preponderance, it may also be clear and convincing evidence.

The words "clear and convincing" are words that are words similar or equivalent by the courts, or even used by one or more of the courts in the leading cases that have been cited and discussed many times by this Court and counsel in the course of these proceedings, namely Tanner -- namely Sullivan, namely Dioguardin, D-i-o-g-u-a-r-d-i-n.

The words "clear" or "convincing," as words, they are perfect. The burden of proof standard may

be clear, and the proof that the plaintiff has to meet is by clear and convincing evidence.

Certainly in this case the plaintiff has not come close to establishing by clear and convincing evidence the incompetency of Mr. Wallace during the relevant time period. Certainly, in this Court's judgment, the plaintiff has not come close to establishing it by a preponderance of the evidence.

I note the opinion of Dr. Tuckman. I think what Mr. Arthur Rosenbaum just recently said in closing argument is fair: Dr. Tuckman did want to rely on the additional information that Mr. Arthur Rosenbaum referred to before he came forward with an opinion. I note Dr. Tuckman's credentials.

I do not disregard his opinion lightly, but I think he has leaped from his diagnoses of psychiatric and emotional illnesses, which he believes it is possible to find on the basis of what he has been told, but he leaps from those conclusions to the conclusion of juror incompetency.

I don't think that that is a leap that can be taken, and it's a leap, as I understand it, that Dr. Burger would not make. The difference between what has come forward from Dr. Tuckman and Dr. Burger was their difference in this.

Despite careful cross-examination and detailed cross-examination by Mr. Arthur Rosenbaum, which

this Court has come to learn that Mr. Arthur Rosenbaum is very capable, as demonstrated throughout a long trial, but today he has examined Dr. Burger carefully, and Dr. Burger has made it clear he has indicated possibilities. He has indicated that certain facts could well be consistent with certain diagnoses.

But he has indicated also that he is not ready to reach diagnoses based on this record, and he has stuck to that position. He has also stuck to the position that on the basis of what, however, he analyzes, what problems and diseases and/or the like that Mr. Wallace may have suffered from during the relevant time frame, he is not ready to express a view with regard to the competency of Mr. Wallace during the period involved.

Indeed, when I questioned him a few moments ago, he refused to indicate whether or not -- or didn't refuse, he said he was not able to reach an opinion, whether or not Mr. Wallace could be, would be, should be adjudicated insane during the relevant period of time, or whether or not he was able to follow the Court's instructions with regard to the law and with regard to making findings of fact based on the evidence, and in an objective, impartial, nonbiased way.

I think that this Court accepts Dr. Burger's position, and accordingly concludes that plaintiff has not proved by a preponderance of the evidence, if

that be the standard that is applicable -- and that certainly is the least standard that the plaintiff would have to bear -- the Court comes to the conclusion that the plaintiff has not borne the burden by a preponderance of the evidence of establishing incompetency.

Indeed, if the Court had to go further, the Court's conclusion, even after hearing the reservations of Dr. Burger, and even in the light of Dr. Tuckman's opinions, which the Court has carefully considered and respects, would be to conclude that Mr. Wallace is not incompetent as a juror.

Accordingly, I conclude that the plaintiff has not met the burden of proving -- excuse me, has not met the burden of proof by clear and convincing evidence, or even by a preponderance of the evidence, that Mr. Wallace was incompetent during the relevant time frame.

Number two, this Court, if it had to, and if it had a gun at its head, had no question in its mind at the time that this Court, based upon this evidence, could conclude that indeed, if the defendants had to prove competency by a preponderance of the evidence, they have done so.

With regard to the time frame involved, I side with the plaintiff. I think there is, as I have said earlier on the record during this proceeding,

sufficient circumstantial evidence to indicate that whatever problems Mr. Wallace has been suffering from and whatever mental diseases and the like that he may have, he has had them continually and for quite some time, and had them throughout the trial of this case.

I think there is no reason to believe that someone who says that he has continually had the views and convictions that Mr. Wallace says he has with regard to his powers inherited from ancient Egyptians or his ability to go through walls, et cetera, et cetera, had any different views in those regards during the period that he served as a juror.

I think there is no reason at all to believe that Mr. Wallace couldn't have the same views with regard to his connections with these educational institutions and IBM and so forth throughout that period. Indeed, I have no question on an affirmative basis the plaintiff has proved by circumstantial evidence that Mr. Wallace held to these views throughout his jury service.

Now, I recognize that in relying on that kind of circumstantial evidence, it is arguable that the case law tells us that it is not sufficient evidence, that direct evidence is required in order to make the time, t-i-m-e, to make the findings I must make.

But I don't think that's in the case law, and I think in common sense that the time burden, the

burden with regard to timing has been met with respect to the plaintiff. I think the plaintiff, that's all that the plaintiff has shown as proven to me.

As a fact finder who saw Mr. Wallace throughout a long trial that took several weeks, as a fact finder who observed him ask questions and -- that is, write them out when he was told to, watched his reaction when he got his answers, watched him when he got up as jury foreman in connection with the respective verdicts, watched him throughout the trial, watched him here in chambers in the last several weeks on two occasions, I have little question but that that is a man who can operate in life, and who nobody would certify and put away into a mental institution.

I have, therefore, no question but that on the basis of what this Court has learned, this is not a man who was insane, either closely before or during or closely after the period of his service as a juror in this case.

I have also very little question about the fact that this is a man who can operate normally in life. He may be, may be -- and I want to just underline that word "may" -- and I note and refer to what Dr. Burger said today with respect to deception -- this may be a number one con man. Maybe he knows what he is doing in terms of trying to con people. I don't know.

I certainly am wary of expressing a view in regard and in light of what I heard from Dr. Burger. But this man certainly surprised me -- well, let me put it this way: I was certainly -- and I am being totally, fully, candidly honest -- I was totally surprised when I learned the additional information after Mr. Wallace answered the questions that Mr. Rosenbaum propounded, to find that it would certainly appear most likely that Mr. Wallace gave us totally false information with regard to his -- in connection with the educational institutions and in the other regards and factual regards that Mr. Rosenbaum has concentrated on and emphasized.

I accept, for purposes -- for purposes of this proceeding and this determination on competency and incompetency, I accept the fact that Mr. Wallace lied. I assume the fact that Mr. Wallace lied with regard to his connection with these educational institutions and with IBM, and that he didn't tell the complete truth with regard to his divorce situation. I accept all of that.

He may be a liar -- that is Mr. Wallace -- he may be a con man, but I do not think this adds up to insanity. I don't think it adds up to a situation in which this Court could possibly find Mr. Wallace incompetent to handle his own bank account or to assume other duties in life.

I he were before this Court in terms of whether he or someone else should be given custody

over minor children, his problems and his psychiatric problems, that would serve, would leave this Court to want to inquire very carefully, and it would be after such inquiry that this Court would say he wasn't the kind of person who wasn't allowed to be a parent and the like.

I have various question whether any court or any doctor would say this is a man that should be put in an institution, or this is a man who should not be allowed to, on the whole, live a normal life.

I think it is -- that Mr. Rosenbaum's arguments concerning whether or not these mental problems would have -- strike would have -- did affect the ability of this man to serve as a juror in terms of following the Court's instructions with regard to the law and applying the evidence and finding the facts in accordance with the evidence, objectively and partially and the like, I think Mr. Rosenbaum's arguments are not frivolous, but they are not persuasive to the Court.

I have little or no question that this man's problems did not affect his jury service or his determination as a juror; that his determination of facts were made, as far as this Court can tell, after he carefully listened to the Court's jury instructions, and I have no question that he did that.

Now, just one second, I wan to review my notes that I made before today's arguments and during today's arguments.

As President Harry S. Truman once said, the buck stops here. The buck stops on the shoulders of this Court in terms of determining whether or not the plaintiff has proven incompetency, and the Court concludes that the plaintiff has not done so and has not done so, by a wide margin.

Under those circumstances, this Court will be entering several orders.

In the first place, the Court will enter a sealed order which simply refers to the reasons that this Court has stated today, and denies the plaintiff's request for a new trial on any and all grounds.

The second sealed order will be a formal written denial of the motion to recuse of Defendant Armour, which this Court made clear on the record a number of times.

In addition, the Court is going to enter an unsealed order which will say that the Court has ruled concerning all of the issues raised by plaintiff in support of plaintiff's motion for a new trial, including all issues relating to juror matters, and that all those motions have been denied in all respects.

In addition, the Court will state in writing what it stated a number of times, any and all contentions made by the plaintiff with regard to nonposting, n-o-n-p-o-s-t-i-n-g, of a supersedeas bond are denied.

Finally, I note that the supersedeas bond should have been filed by January 6, 1995. I have been told by the plaintiff that -- and through both the unqualified specific statements of Mr. Arthur Rosenbaum and Mr. Andrew Rosenbaum, that the plaintiff is not going to post the supersedeas bond.

Therefore, I will simply extend the date for that posting to and including today, that the plaintiff has not posted the bond, and states for reasons which the plaintiff previously made known that the plaintiff is not posting the supersedeas bond. I will send a copy of that order to Chief Judge Slaughter.

Also, noting that this Court has concluded in its view the exercise of the jurisdiction conferred upon it by Chief Judge Slaughter as of December 23, 1994, at that point, if I understand correctly, it will be up to the defendants, one or more of them, if they want to, to point out to the Third Circuit the failure to file the supersedeas bond and to bring that matter to the Court's attention in whatever way or in accordance with whatever time requirements the law requires, and it will be up to the Third Circuit to administer that law.

The pursuit of the appeal and any opposition to it will be up to counsel, and this Court's jurisdiction will be at an end, and the case will be fully back in the jurisdiction of the Third Circuit and in the active jurisdiction, I will take it, of the Third Circuit.

With regard to the costs and fees, I have entered an order a day or two ago that was prepared and agreed to as to form only, bill counsel on both sides, and certainly it was not agreed to as to substance by the plaintiff.

s/

Senior United States District Judge

Appendix C - Order of the United States District Court for the District of the Virgin Islands, Division of St. Thomas and St. John, Filed January 25, 1995

Sparky's Waterfront Saloon, Inc., :
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v. :
:
H.E. Lockhart Management, et al.: :

ORDER

(1) For the reasons stated by this Court on the record at the close of the proceedings on January 25, 1995, plaintiff's quest for a new trial is hereby denied. That said ruling encompasses all motions of plaintiff for a new trial, based upon all of the positions stated by plaintiff, including those relating to the foreman of the jury, Mr. Dale Wallace.

(2) It is so ORDERED this 25th day of January, 1995.

s/

Senior United States District Judge

Appendix D - Interim Decisions and Colloquy Regarding the Procedures to be Followed in Assessing Juror Competency, the Propriety of Ordering a Psychiatric Examination and the Standard of Juror Competency (January 4, 1995) [Pages 19a - 28a]

Sparky's Waterfront Saloon, Inc., :
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v. :
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H.E. Lockhart Management, et al. :
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Now, let me go to the last point, and the most important point, competency. Now, I have read and reread the Third Circuit case that has been referred to, the Supreme Court decision in Tanner, T-a-n-n-e-r, v. United States, in 483 U.S. 107, 1987. Of course, the Third Circuit case that has been referred to here several times, Government of the Virgin Islands v. Nicholas, 759 f. 2nd1073, in 1985; and two Tenth Circuit cases, one of them, United States v. D-i-o-g-u-a-r-d-i-n, 492 f. 2nd, in 1974; and Sullivan, S-u-l-l-i-v-a-n, v. Fogg, 613 f. 2nd 465, Second Circuit, 1980.

Now, the fact that your son is taking these down so laboriously indicates to me that you probably haven't read them, all of them.

MR. ROSENBAUM: The last two.

THE COURT: Now, it's the last two that I want to concentrate on in just a minute.

Tanner had to do with intoxication, and perhaps drugs. Nicholas had to do with hearing problems. The facts in the other two cases, the two Second Circuit cases, are a little closer to the kind of situation that we have here, or that we seem to have here or may have here.

Now, take a look, please, down the middle at these two cases. This, Mr. O'Brien, is why I was so strong with you on the telephone the other day, because I had just finished reading these two cases.

Now, in the first case you have a majority opinion by Judge Lombardi, concurred by Judge Friendly, a strong dissent by Judge Feinberg you have three fine, outstanding judges.

Then, by the way, for the court reporter, Mrs. Jackson and the courtroom deputy clerk, all counsel and everybody else, we are not going on too much longer before we stop for lunch. But I think we will get to the point where we schedule ourselves and then take lunch break, and not have more to do today, let everybody go to work.

Now, let me come back to the two Second Circuit cases. You have that kind of a panel in the first case. You have Judge Feinberg, in effect, in

dissent in the strongest possible way, saying how can you not have further inquiry?

You have the Supreme Court, in Tanner, Justice O'Connor, citing and relying on Dioguardin, and certainly expressing a favorable view of what was written by the majority, though not having the precise points, she didn't happen to have the precise points.

And I don't think you will find that the precise point is hit in any other opinions in these cases, for instance, in the dissent in the Supreme Court in Tanner.

Now, what Dioguardin said was that it was not error in a factual situation, which can arguably be said to be somewhat close to what we have, what we think we may have here.

The Second Circuit said, the majority said the trial judge did nothing wrong when he didn't make any further inquiry, and it says it over a vigorous specific dissent.

Then we come to Sullivan, and in Sullivan the trial judge does make an inquiry. He appoints a psychiatrist, and the person who is going to be the patient of the psychiatrist for this purpose, the person to be examined, consents.

One of the issues, by the way, that we may have here is, suppose this Court were to determine that Mr. Stevens, we would like to have the testimony of a psychiatrist--

MR. D. CAPDEVILLE: Mr. Wallace.

MR. ROSENBAUM: Mr. Wallace.

THE COURT: -- or one or more -- Mr. Wallace, excuse me. Suppose the Court were to say that. If Mr. Wallace refuses, what then? I don't know the answer. I haven't reached one yet. I don't know whether any of you know the answer.

That was one of the reasons why I suggested to all of you that I would like to have stand-by counsel for Mr. Wallace. And I do have Mr. Watts -- and Mr. Benham is going to join him, apparently -- available. Mr. Watts may still be off island until late today, but he may be available tomorrow if we need him.

Now, I go back to Sullivan. The trial judge appoints a psychiatrist. The case doesn't tell us who paid for the psychiatrist, whether the parties paid for the psychiatrist, whether the psychiatrist served pro bono. I don't know.

I see Mr. Alfred pointing to Mr. Rosenbaum. I'm not sure. I'm not sure that costs don't get borne by everybody. I am not sure it doesn't. I don't

know who pays for the costs of the psychiatrists, or whether you get separate psychiatrists, though I would think that it might make sense to have one appointed by the Court, and keep it to that.

And again, we have the question of whether Mr. Wallace would agree to do it or wouldn't agree to do it, and what powers the Court has, what power, if the Court has powers, how they should be exercised in terms of that kind of a situation.

But look at Sullivan v. Fogg. The Trial judge did appoint a psychiatrist. He got a complete report. He said, "That report is enough for me. I am not going to have any hearing and have an examination of a psychiatrist."

The Second Circuit panel unanimously said, "That is error," and remanded the case for an evidentiary hearing, with counsel having the opportunity to examine, cross-examine the psychiatrist.

Ask yourselves, ladies and gentlemen, this question: If there was no need in the first place for the trial judge in Sullivan to have appointed a psychiatrist, it seems to me the Second Circuit, relying on Dioguardin, could have simply said just that, and then gone on to say that if we felt otherwise, if we felt that the appointment of the psychiatrist was necessary, then there would have to be an adversarial kind of proceeding, but not otherwise.

What did they do? They didn't say a word about the fact, in Sullivan, that Dioguardin meant that you -- that the trial judge didn't need to have done it. They sent it back to the trial judge for the evidentiary hearing.

Now, I am not here to tell you that I know what the law of the Second Circuit is. But when Mr. Hogroian told me over the telephone that he knew the Second and Third Circuits had said that in this kind of factual situation, there was no need for any further inquiry, and he indeed went further and said it would be wrong for there to be further inquiry, and he said he understood that due process required that you have competent jurors; but that there was no need, under the Second Circuit and Third Circuit approach, for this Court to go any further.

I simply say to him, he may be right, but he may be wrong. Because I don't know what the combination of Dioguardin and Sullivan tells us.

Again, Dioguardin would suggest that I could simply say no further inquiry, this isn't the kind of thing that needs to go any further, and go with the view that was expressed by Judge Lombardi and concurred with by Judge Friendly -- and this has been despite the dissent by Judge Feinberg.

But on the other hand, as I look at Sullivan I find it hard to believe that the Second Circuit panel would have sent the case back for an evidentiary hearing if they didn't think that there was need to appoint a psychiatrist in the first place.

I am not, please, suggesting that Sullivan overrules Dioguardin. I am simply saying that it raises this question, Sullivan raises this question in my mind, and I want all of you to think about this, and I will read all your written presentations.

What I have in mind doing is the following: I want to outline the schedule of what we all need to do, and set up another hearing as quickly as possible.

I am prepared to go ahead, I think, to call the FBI agent and to get that out of the way. And I have his number. I could do that right now, before we break for lunch. That shouldn't take but a minute or two. And then I would like to see what you think you need to research and do.

But on a tentative basis, if I have done what I have to do today -- and I don't have, but if I had a gun at my head, today, I would not recuse myself.

Two, I would not do anything further with regard to any alleged wrongdoing of Mr. Rosenbaum and the way he brought the matter to the Court's attention.

Three, I would decide whether or not to go further into anything further on the alleged tampering or the like, after I talk to the FBI agent.

Four, with regard to the inquiry with regard to the miscellaneous matters, including this Skoff matter, I will have more to say after I have talked to the FBI agent.

Five, at the moment, whether or not I appoint a psychiatrist or not and, if so, on what basis, I don't know, tentatively subject to not only rereading these cases, but also the cases they cite, and trying to finish reading the treatises and other stuff. And in fairness, the treatise stuff is as large as the case law. But I would hope that either by tomorrow or the next day to rule on that issue.

If I were to rule that I would get a psychiatric opinion, I will also want to talk to counsel as to what the standards are; that is, put more precisely: What is the definition of "competency" in this sense?

I think I understand what Mr. Hogroian particularly, and other defense counsel, were trying to say to me on the phone. And what I think has come through on everything is that, in their guts, they really just don't feel that this adds up to incompetency of a juror anyhow.

Mr. Rosenbaum is arguing the other side, and it seems to me this is a very doubtful question. And in a sense, looking at the two Second Circuit cases, the same problem occurs.

Judge Eldstein just did not feel that this added up to something that he needed to inquire into, in terms of competency.

But another good trial judge in the Sullivan case, Judge Griesa, G-r-i-e-s-a, felt to the contrary, and seemingly a panel, a very good panel, Judge Joseph Smith, Judge Irvin Kaufman and Judge James Oaks, agreed with him, and went one step further than he went, and said you have to hold an adversarial hearing, just not get another opinion.

That is the problem that I was referring to on the phone, Mr. Hogroian, when I said to you I read all this case law, I thought about it, and I don't know the answer, and I don't know how you could be so sure that you know what the Second Circuit's position is.

Now, if I have missed something, I am glad to hear it. If not, I would leave everything where it is, get FBI agent on the phone, try to get the answer from him, and then schedule with you ladies and gentlemen what we need to do before we next get together tomorrow or Friday.

MR. ALFRED: Friday is a holiday.

THE DEPUTY CLERK: It's not a federal holiday.

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Appendix E - Interim Decisions and Colloquy Regarding the Mental Competence of Juror # 8 (January 13, 1995) [Pages 29a - 32a]

Sparky's Waterfront Saloon, Inc., :
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v. :
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H.E. Lockhart Management, et al.: :

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THE COURT: I will speak first. On a tentative basis, and a rather strong tentative basis, the final determination in this kind of a matter is not for an expert witness. It is for the Court.

There are many people who believe in various ancient rites, r-i-t-e-s, and in ancient customs and ancient philosophies. I have heard nothing that indicates that during the jury proceeding, any of these views were expressed by Mr. Wallace or alluded to in any way.

I do take into account that the psychiatrist who was consulted by Mr. Arthur Rosenbaum and plaintiff's counsel has said that someone who holds these views could be sufficiently disturbed so as to not be competent. But the fact that somebody even is disturbed does not, in my judgment, mean that someone is not competent.

I wouldn't think that, on a nonfrivolous basis, there is one attorney in this case who could possibly, nonfrivolously, argue that Mr. Wallace could be committed as incompetent to an institution, or that he could be held not to have a right to vote or that he would be adjudged incompetent in terms of doing anything. I cannot see how he would be incompetent to serve as a juror.

There can be a challenge for cause sustained and a ground for challenge for cause, which obviously doesn't add up to incompetence.

I don't believe that this man did anything in the jury room that indicates that his thinking and his philosophies and anything else that you want to label them that would influence anybody else. There is no indication of that whatsoever.

It has been pointed out that he was chosen as the foresperson. It has been pointed out that he asked several intelligent questions, as, for example, with regard to the two Capadeville brothers and their role as with regard to an attorney who has not been identified.

I watched him carefully, as I watched all the jurors, through trial. I saw no problem with him, nor did I hear of any problem raised by anyone connected with the case, counsel, staff or anyone else.

In addition, I watched him very carefully today, on the occasion that he has been here. He seems to be a very intelligent person. He ran, as the record shows, for elected office, and there is no indication that anybody thought that or suggested that he was incompetent in that regard.

As a matter of fact, his educational background and his educational experience would indicate that others who operate on a pretty high level of experience and ability and aptitude thought well enough of him to have him involved in responsible, educational endeavors.

I can't see the possible need to go any further here. The case law teaches that, as Mr. Hogroian and Ms. Kleeger and Mr. Alfred and Ms. Bornn and Mr. Capdeville have all argued to me vigorously, that I did not have to go anywhere near as far as I have gone in terms of inquiry, and that, indeed, I have probably -- they think I have gone over the line.

I don't think I have gone over line in view of the fact that we have been able to handle this matter quietly and confidentially and on a sealed basis, and I don't think we have done any harm to the jury system or in any was materially affected any human being improperly since the first reports of this were brought to the Court and since the matter was expressed on the record, at least, on a sealed, confidential basis at that time.

I think that I am satisfied, though I note defense counsel disagreed with the manner in which the Court handled the matter up to now, but I think that the Court doesn't need to hear anything further.

Nevertheless, if on a quick, prompt basis Mr. Andrew Rosenbaum and/or other plaintiff counsel want to talk to the same psychiatrist and/or another psychiatrist or psychiatrists, and do so, as I have said, quickly and promptly, so as not to hold the show up, I would let them have a chance to put in writing by an agreed time, anything further.

I would give defense counsel a chance to respond if they want to, although I would tell defense counsel no that there would be no need for them to respond unless I call for the same, so they could have the opportunity to do so. If they respond, there could be a chance for quick rebuttal.

I cannot conceive that this Court is going to accept -- well, that is not a good way to put it. I can't go that far. I can't be that absolute. I will withdraw, therefore, the statement, "I can't conceive."

But I think, on a strong, tentative basis, I am most unlikely to think that -- to reach the conclusion that Mr. Wallace was not competent to act as a juror in this case, and didn't act as a competent juror in this case.

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Appendix F - Interim Decisions and Colloquy Regarding Procedures to be Followed in Assessing Mental Competency, Retaining an Expert Psychiatrist and the Possibility of Conducting a Psychiatric Examination of Juror # 8 (January 17, 1995) [Pages 33a - 38a]

Sparky's Waterfront Saloon, Inc., :
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v. :
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H.E. Lockhart Management, et al.: :

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I have had a little time to think, and my views are only tentative, but I must say the following: If Mr. Wallace has manufactured his entire educational background, if Mr. Wallace did not have anything to do with any of these institutions, if those turn out to be facts -- and I underline the word "if" - - if they turn out to be facts, that, plus everything else that this Court has learned, including the opinions of the consulting -- the psychiatrist consulted by plaintiff counsel, namely Dr. Tuckman, T-u-c-k-m-a-n, may well require this Court to go forward with further proceedings and inquiry, including the possibility of the need to determine whether Mr. Wallace will make himself available for a psychiatric examination.

I, however, do not lose sight for one moment of something that defense counsel have been quite meritoriously pressing, and that has to do with the effect of anything that I refer to or anything that has shown up in this case on the performance of Mr. Wallace in the courtroom and/or in the jury room.

The poses a hurdle for plaintiff counsel. But I think in the end, the case law teaches that common sense has to prevail. And I really don't know, under the -- I really don't know how plaintiff counsel at this time can do very much more than they have done to raise these issues, and it seems to me now that if -- and I underline the word "if" again -- Mr. Wallace has totally given false information or untrue information with regard to his background and experience and the like, and you add that to everything else, I don't know how much more any plaintiff counsel and common sense could do before a Court would have to go further and inquire in the manner I have indicated.

Now, I made it clear at the start that I am going to give whatever reasonable time is required for defense counsel to examine all these documents, and I am going to set very strict time limits on what else is going to come in by way of Stanford or any other institution, and any supplemental documents, including the completion of affidavits and so forth from plaintiff. So, the plaintiffs are going to be

under a tight schedule. The defendants are going to have to be under a tight schedule.

I still want to try to meet my announced aim, a-i-m, in this case of getting all this done this month. If we are going to have an outside psychiatrist, arrangements will have to be made to bring a psychiatrist here and have the examination.

Before we even make those arrangements, so they could be made tentatively -- and although I anticipate the reaction of defense counsel will be no, I am telling them to think, and count to ten. I can assure them I am not going to set up any arrangements of any final basis for anything until they are fully heard.

But I see no harm, on a tentative basis, with trying to think ahead to who the consulting psychiatrist would be, if we have one, to when and how he would be used, if we have one, and to going into with Mr. Wallace at a proper time -- but this, I would not want to take up with Mr. Wallace or his counsel until there was sufficient time for all counsel to be prepared and heard -- the question of whether Mr. Wallace will consent to a psychiatric examination; and if he won't, where that leaves us.

It could leave the plaintiff in a position where the plaintiff couldn't get -- could not prevail in terms of any relief being sought in this case, which is, in the lower right-hand corner, a new trial. And

it could leave defendants in a position where defendants might not be able to come forward to respond to information or facts which defendants would like to put in, in response.

Those are issues before us, and I am not -- and I want to underline -- I am not suggesting that this Court is ready to take up with Mr. Wallace and/or his counsel what participation, if any, Mr. Wallace should have in this case, in these matters, from this point on. That is, I am not ready till counsel get a chance to go over these documents.

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Now, having said that, I want to come back to where I was a few moments ago. It seems to me that the only thing I can even do, tentatively, with all of you, is at this point, in fairness to all of you, but particularly in fairness to defense counsel, is to try to find out what your schedules are for whatever lies ahead, if anything, in this case, and also to discuss with you the possible candidates for the Court to name as a court-appointed psychiatrist, if the Court needs to do that.

I again want to do the latter, so that if we do need a consulting psychiatrist, we have those arrangements in place. And again, I reiterate that I am nowhere near the point of following through with such appointment, but I want to find out who

would be available, when, what the cost would be, who will pay for the same, et cetera.

Now, unless plaintiff counsel have something to add, I think I want to see if any defense counsel wants to be heard.

I note the continued overriding, underlying objections of defense counsel to anything along these lines going forward in this case.

But I must tell defense counsel that I do not need to hear from them on anything that I have commented on at this time. It seems perfectly obvious to me that, as officers of this Court, defense counsel would have to recognize that if we add to the problems that the psychiatrist sees with growing out of delusion, et cetera, a completely false tale with regard to educational and work experience, then there is no question but that this Court is going to have to take a new look at this case.

That does not mean -- and I tell plaintiff counsel this -- that does not mean that this Court has made up its mind that plaintiff would be right. There is still the problem of connecting this up in terms of time with jury deliberations and jury service.

But it is a much closer, more difficult kind of an issue than we would be facing today if all of the information which we have all received with

regard to educational and job experience were true. Assuming that, arguendo, that it is not true, we have a different dimension.

It is one thing to say that somebody is convinced of ancient cults and so forth. It is far different to have someone, as late as Friday, on the record in this case, state the kind of teaching and educational, et cetera, records, and have it, if it turns out to be this way, totally untrue.

So, if there is something that any of counsel feel compelled to be heard on, I will go around first to plaintiff, let me hear from them on -- I will go around and hear from counsel.

Otherwise, I want to take up with counsel the curricula vitae that I have available, curricula vitae from various doctors in the stack of documents here on this desk table.

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Appendix G - Interim Decisions and Colloquy Regarding the Standard of Juror Competency, the Propriety of Ordering a Psychiatric Examination of a Juror and Procedures to be Followed (January 18, 1995) [Pages 39a - 49a]

Sparky's Waterfront Saloon, Inc., :
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v. :
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H.E. Lockhart Management, et al.: :

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Basically, what we get to here is what is competency or imcompetency of a juror. I have been critical, and bluntly critical, when I thought it was proper, of one or more counsel in terms of research and factual presentation.

But in fairness to all counsel, I haven't been able to find -- and I still have one of my law clerks up in Baltimore looking tinto it right now, because the computerized research in this courthouse broke down this moring, so I have been utilizing the facilities in Baltimore.

I have him checking to see whether we can find anything in the literature, in the case law, with regard to what is competency in terms of juror competency. And there is very little.

If you will look at a Fourth Circuit case which plaintiff counsel cited to the Court, United States v. Hall, 989 f. 2nd, 711, Fourth Circuit, 1993, at page 714, you will find this ritten: "To enforce this right" -- let me start, go back up. And I will leave out the cites, citations, that is.

> "A defendant is constituionally entitled to mentally competent jurors. Due process implies a mentally competent tribunal. Mental incapacity to serve, no less than the existence of bias, strikes at the very fitness of the journeyman to sit as a juror.
>
> To enforce this right, the jury's verdict must be set aside if the defendant presents 'clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service.' "

Those quotes are from Dioguardin, the Second Circuit case that the Supreme Court and Third Circuyit both relied on and cited to with favor.

The psychiatrist who has been consulting with plaintiff counsel and who has rendered several opinions has said that Mr. Wallace was not competent.

I go first back to the time factor, and then c ome back to the standard, to the extent that we have any idea what the standard of competency is.

With regard to the time factor, I think it is only fair to state in this case that defense counsel is right when they say that we don't have anything before us that indicates that these Egyptian ideas of walking through walls, or even false notions of educational a nd work background, in any way dominated or influenced Mr. Wallace in the jury room or in the courtroom. There isn't any direct evidence of that.

There is circumstantial evidence, however, namely that in answers to the written questions propounded by plaintiff counsel, and in this record it would appear rather clear that Mr. Wallace, since the age of eight, consistently had these ideas of walking through walls and entering into people's minds, et cetera, et cetera, and has inherited this from the Egyptioans and so forth.

It would also appear, from his answers to the questions, that his position with regard to his educational and his work experience is something that is not new.

The business of his learning of the alleged tampering certainly comes after the trial, and except for the initial conversation with Mr. Stevens, comes quite a while after the trial.

But if we are looking basically at competency questions, assuming arguendo only that the New

York consulting psychiatrist of plaintiff is right, and that his analysis is correct, and that ends up with the need to conclude incompetency, insofar as timing is concerned it would sem to me that while there is no direct evidence, as I have indicated, there is circumstantial evidence that Mr. Wallace entertained these ideas of his power and of his education and of his work experience before and during and after his jury service in this case.

On that basis, I get by, in my own mind, to my own satisfaction, though I do not to defendants' satisfaction, the timing question. And I don't think that on a fair basis, the timing should be otherwise approached.

Now, that brings me to this question, the question of: What is juror competency?

I wonder whether there is an attorney here, or whether the plaintiff consulting psychiatrist would say, that Mr. Wallace can be committed, or would be committed, by any court, based upon the record in this case, would be committed to an institution, or that his legal powers would be taken away from him in terms of handling his own money or bank accounts or things of that kind.

Even assuming arguendo only that Mr. Wallace has not told the truth and has bare-faced lied, not told the truth with regard to his work

experience and his education, at the worse, that might make him into a very good con man.

I watched him carefully. Counsel who were here, when he was here with his counsel, Ms. Bourne -- not any relative to Mrs. Bornn who is here --

MS. BORNN: Judith Bourne.

THE COURT: -- had a chance to see him. All of you saw him during trial.

I must tell you that I didn't think he was telling anything but the truth here the other day, and I put that on the record. He conned me, if you want to put it that way, if that's what he was doing.

Now, of course, if he is sick, you don't call it conning. But if he is competent, is he more than a con man?

I don't know.

If someone can live the life that Mr. Wallace is living, run for office in the way that he did and that the record shows, seemingly get along in the world, is he incompetent in terms of serving as a juror?

Is it so clear that -- to use that Fourth Circuit standard at all -- that there is clear evidence that he couldn't understand the issues in this case and to deliberate and to follow this Court's instructions with regard to the law, and to make his findings of fact based on the evidence in the case, is that clear? Has the burden been carried?

I will understand, unless one of counsel tells me to the contrary, that none of counsel for either side have been able to come up with a ny law, either in treatise form or commentary form or case law or anything else, that really tells us what is, quote, competency, unquote, in terms of a juror, or incompetency. I don't think we found it.

I do not denigrate -- I do not reach a conclusion that this psychiatrist consulted by plaintiff counsel is wrong, but I do not think that you can leap from the psychiatric type of analysis that is stated in the opinions of that psychiatrist to a conclusiion of incompetency without getting deeper into the issue that I am now getting to.

If I knew the answer to the standard, the so-called question of standard, that is, "What is juror competency," then we could use that as an anchor point. But I don't have that.

Now, there are a few other comments at random, I believe, that I want to make from my notes from working last night and this morning.

Now, in that light, subject to hearing anything new and nonrepetitive and noncumulative, I have determined, on a strong tentative basis, that I am going to do the following.

The first thing I have already done, but I can call it off. I asked Mrs. Trotman, deputy clerk of this Court, to palce a call to Ms. Bourne, who is counsel for Mr. Wallace, and to see whether Mr. Wallace and Ms. Bourne, his counsel, could come here today.

Ms. Bourne has not been able to get a hold of Mr. Wallace, and Ms. Bourne has a dentist appointment and also asked -- that is, Ms. Edith Bornn -- no, Ms. Judith Bourne. Ms. Edith Bornn is here as counsel for the Trust. Ms. Judith Bourne asked whether it coujld be done tomorrow.

Tentatively, subject to hearing from Ms. Judith Bourne, Ms. Bourne will be here with Mr. Wallace tomorrow, unless I tell her to the contrary. I did not talk to her. I asked Mrs. Trotman simply to call and make the arrangements for Ms. Judith Bourne and Mr. Wallace to be here, if possible, today or tomorrow.

What I have in mind doing on the record, with all counsel present in the same manner as today or as they choose, in person or on the telephone, is to ask whether or not Mr. Wallace will

voluntarily agree to a psychiatric examination by a court-appointed psychiatrist. And I would have identified that psychiatrist, hopefully, by then.

If Mr. Wallace does not so voluntarily agree, I would not expect to order the psychiatric examination. If you will look at Judge Feinberg's dissent in Dioguardin -- and I think in onr or two other cases there is reference, I think, maybe in Sullivan, at least indirectly, you get the question of whether or not any of the courts ever ordered a psychiatric examination of a juror.

I cannot find any authority for it. If any of counsel can, not just as an advocate but also as officers of the Court, I expect you to bring it to the Court's attention.

Now, if Mr. Wallace were to say that he would volunteer, or would voluntarily -- not volunteer, but that voluntarily he would submit to such an examination, I would have in mind bringing the psychiatrist here, the court-appointed psychiatrist, having him meet alone with Mr. Wallace, and then have him, either in writing and/or orally, given his report; if it's orally, on the record, and let all counsel have an opportunity to examine and cross-examine the court-appointed psychiatrist.

And I would expect to ask that court-appointed -- myself, to ask that court-appointed psychiatrist with regard to juror competency, and

what he understands the standards of juror competnecy are from his professional a nd expert point of view.

In the end, however, the Court will have to make the determination of those standards. In the end, the Court will have to make the ultimate finding of whether or not there is compentency.

If this is going to be done, I would expect to try to do it this week, and conclude it, if not this week, certainly the beginning of next week. I have a one-day jury accident trial on Monday, but I give this priority, and if I have to recess that case, I will.

If Mr. Wallace were to say that he did not want voluntarily to undergo psychiatric examination, I would turn over to the court-appointed psychiatrist the documents that are available in this case. And they would include the original report from Mr. Rosenbaum, the FBI report, the transcript of my discussion with the FBI agent, the several opinions from the consulting psychiatrist of plaintiff, and the entire -- and all of the questions and answers of Mr. Wallace.

I don't think we need to get into the questions and answers of Mr. Stevens on Mr. Skoff but the questions and answers of Mr. Rosenbaum -- not Mr. Rosenbaum -- of Mr. Wallace -- it would be the questions posed by Mr. Rosenbaum to Mr.

Wallace, and Mr. Wallace's answers, would be included.

If all of you would agree, as I hope you would agree, if we are dealing with a situation in which Mr. Wallace is not going to be examined by the psychiatrist that I appoint, and it would only be -- and the psychiatrist that I appoint would be expressing his opinions on the basis of the written record, plus if there is anything proper in addition that should be presented to the psychiatrist by this Court and other counsel, there would be opportunity to do that in writing and/or orally.

I have lost track of my long, drawn out sentence here, but if everybody would agree -- and if there is not going to be a psychiatric examination on a voluntary basis, I would hope that counsel would be able to examine and cross-examine the consulting psychiatrist that I would appoint, the court expert, on the telephone, and not bring that person down here.

I would expect to try to do all of this either this week or the beginning of next week. Then I would expect immediately, and as early and as quickly as possible, and hopefully possibly this week, if not the early part of next week, to file, on a sealed basis, a short memorandum and order ruling first on the motion for recusal and denying it; second on the motion for a new trial, and that would have to await the competency determination.

That is my decision in that regard, and I am not ready with that now.

I will also -- the memorandum and order that I file, or memoranda and orders that I file with regard to recusal and/or the jury matter will be sealed.

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Appendix H - Interim Decisions and Colloquy Regarding the Use of a Psychiatric Expert and the Court's Thoughts Regarding Juror Competency (January 18, 1995) [Pages 50a - 51a]

Sparky's Waterfront Saloon, Inc., :
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H.E. Lockhart Management, et al.: :

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If everybody wants it and there is no objection, I probably am going to try to do it on a controlled basis.

But that is not what makes me at this point have the strong tentative view that I have about the further inquiry to do justice here, in terms of whether or not we are dealing with a man who really was not competent when he served as a juror here.

Somebody can be quite ill in this world and be competent. There are many people who have written psychiatric biographies of leaders in history, somebody like Napoleon, who ran an army; yet there are all kinds of psychiatrists that will tell you that he suffered from all kinds of problems. Would you say Napoleon couldn't have been a competent juror today?

And hearing that, one or more of defense counsel could say: Well, then, Judge, why have you indicated your tentative views?

I have indicated it because it seems to me that going a little bit further here, in the way I have indicated, will give all of us more insight and understanding than we have now.

If I get a totally detached, experienced psychiatrist, the views of that kind of a person who is a trained forensic psychiatrist, may help us to understand what is jury competency, particularly within the factual context of this case.

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Appendix I - Interim Decisions and Colloquy Regarding the Standard of Juror Competency and the Purpose of Retaining an Expert Psychiatrist (January 21, 1995) [Pages 52a - 56a]

Sparky's Waterfront Saloon, Inc., :
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H.E. Lockhart Management, et al.: :

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What defense counsel have each said, I think, is totally sound. Ms. Kleeger used the words, "You can' expect Dr. Burger to proceed in a vacuum." We have been over this problem a number of times. None of you have come up with any cold answer -- and I am not critical, because my law clerks and I haven't been able to come up with any full answer on this -- and I don't think there is any, or perhaps there isn't any -- to the question:

What does "competency of a juror" mean?

Does it mean simply the ability to follow the Court's instructions with regard to the law and determine the facts impartially, objectively and fairly and without bias, prejudice or sympathy, based on the evidence in the case?

Is that what it means?

Does it mean, as -- I will get the pronunciation -- Deward says in the Second Circuit case, and in Tanner -- and the majority of the Tanner folks, who include this quote, and favorably quote this, what I am now coming to, that was in Dioguardin, namely that, "Even for a trial court to be required to go forward to permit an evidentiary inquiry with regard to the competency of a juror, there has to be reason to believe that the juror involved was insane, adjudicated insane or was subject to adjudication of insanity at the time of jury service."

That may be the test of juror competency. I think I have to make the determination -- I totally agree with Mr. Andrew Rosenbaum, as apparently do all defense counsel, that the court must make the determination of competency. But this Court has made the determination that it has the right to exercise the discretion that it has exercised, to get the benefit of the testimony of Dr. Burger.

I am not going to ask Dr. Burger to testify on a blind-folded basis. It is almost ludicrous to suggest that the Court and counsel cannot examine a forensic psychiatrist with reference to the applicable legal standard.

I will have to instruct Dr. Burger, before we are finished on Wednesday, to the extent it is needed with regard to legal principles, and I shall

do so. In the end, I will have to make the determination of competency, and I will do so.

I have called this court expert because I am perfectly willing to try to get help from a trained expert forensic psychiatrist like Dr. Burger, under these circumstances. The psychiatrist is not limited, as Mr. Andrew Rosenbaum seems to suggest, to talking in a vacuum in terms of psychiatrist determinations about whether someone is suffering from an emotional or a mental disease or the like.

The opinions that have come from the psychiatrist who has been consulted by plaintiff counsel to date leap, l-e-a-p, quickly from statements with regard to t he analysis of the juror, Mr. Wallace and what he is suffering from, and leap quickly, almost like a quick-bounding dog, to the point of saying that equals juror incompetency. Maybe it does, maybe it doesn't.

No one has objected, other than the defendants' objection on an underlying, overriding basis, to t his court doing anything along the lines that it is doing.

No one has objected to the doctor from New York coming up with a conclusory assertion of competency -- excuse me, of incompetency. And that is the job of this Court.

The answer is, if you look at the Federal Rules of Evidence, you will find that the fact that the ultimate question here of competency has to be determined by the Court, does not mean that an opinion cannot be expressed by an expert with regard to it.

How in the world an opinion as to the competency of a juror can be stated by an expert witness like Dr. Burger, without some instruction with regard to the law in terms of what is competency of juror, I do not know.

Accordingly, the objections of Mr. Rosenbaum are noted and overruled in their entirety, and all of the cases that have been sent to Dr. Burger, including the McDonough case, will be available to him.

I gave all counsel the opportunity to add to the list. They have not added to the list, and they have had plenty of time to know what cases should be listed. Certainly since December 20th, all counsel have been alerted to the questions of: What is juror competency? I raised that question on December 20th in a telephone conference.

The record will have to speak for itself, if my recollection is right, because it has been in my mind from the word "go," and because my law clerks and I briefed in advance of December 20. All counsel

have had more than enough time to know what cases they want to rely on.

I see no reason why those cases that have been argued to this Court over these weeks shouldn't be read by a trained forensic psychiatrist. I think it is almost utterly ridiculous to suggest that we proceed otherwise, for the reasons that defense counsel have articulated during this proceeding this afternoon and that I have tried to articulate.

I have nothing else to add, except to go over the arrangements that are in effect.

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Appendix J - Answers to Questions Propounded by Mr. Rosenbaum, Sworn to November 13, 1995 [Pages 57a - 64a]

As to MR. WALLACE:

1. Where do you reside?

Ans. Estate Thomas, 4th Street No. 12.

2. How long have you resided?

Ans. at least 25 years.

3. With whom do you resided there?

Ans. by myself.

4. Are you married?

Ans. No.

5. If so, what is the name of your wife?

Ans. Not applicable.

6. If not, were you divorced or separated?

Ans. divorced.

7. When?

Ans. I think it was 1975.

8. Was your divorce contested or uncontested?

Ans. uncontested, I initiated it.

9. Do you have any children? How many? Ages?

Ans. Yes, 3, 18, 16 & 12 yrs.

10. Where do they reside? With whom?

Ans. In New York with their mother.

11. Please describe your ability to fly.

Ans. I can project my thoughts to others (telepathy). I can project my spirit (out-of-body experience or astral projection). I can move my body in defiance of gravity. All of these are described in metaphysical writings.

12. How long have you been able to do that?

Ans. I have known that I have these abilities since I was about 8 years of age.

13. Has anyone, that you know of, seen you fly?

Ans. No. All efforts are made to avoid being seen to avoid confusion.

14. Do you know what powers you possess that enable you to fly?

Ans. The powers are through descent or inheritance.

15. How often have you been able to do that?

Ans. At will.

16. Please describe you ability to disappear and/or make yourself invisible?

Ans. I can will myself to be unseen.

17. How long have you been able to do that?

Ans. Same as question 12.

18. Has, anyone, that you know of, seen you make yourself disappear and/or make yourself invisible?

Ans. Same as 13.

19. Do you know what power you possess that enables you to make yourself disappear and/or make yourself invisible?

Ans. No.

20. How often have you been able to do that?

Ans. At will.

21. Please describe your ability to walk through solid walls.

Ans. I can modify the atomic structure of my body to pass through what appear to be solid structures.

22. How long have you been able to do that?

Ans. Same as question 12.

23. Has anyone, that you know of, seen you walk through solid walls?

Ans. Same as question 13.

24. Do you know that powers you possess that enable you to walk through solid walls? How often have you been able to do that?

Ans. No. Done at will.

25. Can you describe what the "Book of M" is?

Ans. An actual book entitled Modus Operandi which is a metaphysical textbook.

26. Besides your ability to fly, disappear and to walk through solid walls, do you have any other powers?

Ans. None that I wish to speak of.

27. Please describe those other powers.

Ans. Not applicable.

28. What is your educational background?

Ans. Boston Univ. Ph.D. - Music & Business Admin. (joint) 19___. Julliard School of Music - M.A. Music Education 197_. Manhattan School of Music - BA 1976. Sloane Business School, Stanford U. - MA (Bus. Admin. 1971), Faque School of Bus. BA (Bus. Ad - 1____).

29. What is your employment background?

Ans. Self employed business consultant since 1987. Prof. of Music - S.U. 1982 - 1987, IBM - business consultant 1978 - 1980.

30. Did you recently run for public office?

Ans. Yes.

31. What position?

Ans. Senator.

32. Described your campaign? Did you have a campaign manager?

Ans. No manager. Theme - Equal Access to Opportunities. Used forums, door-to-door campaigning, etc.

33. Did you have a political platform?

Ans. Yes - Equal Access to Opportunities.

34. Did you participate in any political debates?

Ans. Yes.

35. Were you interviewed by any media?

Ans. No.

36. If so, when, where and by whom?

Ans. Not applicable.

37. Were you able to use any of your special powers in your campaign?

Ans. I did not, and would never have, done that.

38. If so, what powers did you use?

Ans. Not applicable.

39. With regard to your infiltration of the Masons meeting, have you ever done that before? When? How many times?

Ans. Yes, virtually every meeting since I returned home.

40. Have you ever infiltrated other meetings? When? Where? How many times?

Ans. Yes, Jewish Quabala, Illuminati, Mormons, Lodge on the Rock, Cali Cartel, East Asiatic Co., Rotary Clubs, Humane Society, Historical Trust, Rosicrusians, Knights of Columbus, Bulays, Zionists - All groups whenever and wherever they meet.

41. Are there any other "secret" organizations that you are familiar with, other than the Masons?

Ans. See above.

42. When Mr. Stevens told you after the trial that he was getting a car or cash from someone, did he mention specifically who was giving him the items? If Yes, who?

Ans. No.

43. When did he mentioned that to you?

Ans. Just after the trial, in the parking lot behind the Federal Building.

s/

Dale Wallace

Sworn to and Subscribed before me this 13th day of January, 1995

s/

Notary Public
My commission expires May 17, 1998

Appendix K - Expert Psychiatrist's Written Opinion Regarding the Competency of Juror # 8 [Pages 64a - 70a]

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PSYCHIATRIC EVALUATION

Pursuant to the court order dated January 20, 1995, from the Honorable Frank A. Kaufman, Senior United States District Judge, sitting in the District Court of the Virgin Islands, Division of St. Thomas and St. John, I was asked to render a written opinion concerning the competency of Mr. Dale Wallace in his capacity as a juror between the dates of May 23, 1994 and June 10, 1994.

Collateral information available to me is detailed in the court order. There was no opportunity to directly interview Mr. Dale Wallace.

Review of the material provided reveals the following symptoms consistent with a psychoses (inability to differentiate reality from fantasy). Mr. Wallace indicates that it is his belief that he can "project my thoughts to others (telepathy)", "project my spirit (out of body experience or astral projection)", "move my body in defiance of gravity", fly, will himself to be unseen, and possibly have

other powers of which he does not wish to speak. He relates that these powers have existed since he was a child and believes these powers have come about through "descent or inheritance". There is no indication that Mr. Wallace questions these beliefs or feels they may be symptoms of a mental illness.

There are indications that Mr. Wallace is suspicions of many groups of people including the "Masons" and has infiltrated their meeting as well as many other groups through the use of his "powers".

He reported the above beliefs and suspicious in both December 1994 and January 1995. They are best characterized as grandiose paranoid delusions most often associated with psychotic mental illness. These symptoms most closely fit the symptoms associated wilh the schizophrenia spectrum diagnoses. There's no indication that Mr. Wallace believes that these are special religious or spiritual powers, but rather he indicates these are passed down through "descent or inheritance".

Mr. Wallace indicated in a sworn statement that he possessed many advanced educational degrees that collateral information suggests is not true. Should this prove to be the case, this would indicate that Mr. Wallace's ability to maintain adequate reality testing (ability to separate fact from fantasy) is seriously impaired at least in that arena.

There is no direct evidence that Mr. Wallace is suffering from hallucinations, incoherence, grossly disorganized behavior or significant social/occupational dysfunction. These are also signs and symptoms of schizophrenic disorders. It was noted that Mr. Wallace's written answers to questions and typed affidavit were legible and well organized. It was also noted in response to question #37 that Mr. Wallace, at least during his political campaign, chose not to exercise his special powers.

Mr. Wallace's concerns regarding the trial seemed based on his belief that another juror (Mr. Stevens) may have been bribed and exerted undue influence as well as his belief that other jury members were fearful of the defendants in the case. Mr. Wallace also indicated he believed that several of the defendants were powerful business people and members of "a secret society", the "Masons". His reason for coming forward was his belief the trial had been unfair.

Discussion/Opinion

There seems little doubt that between December 1994 and January 1995, that Mr. Wallace displayed multiple delusional beliefs of both a grandiose and paranoid quality that are consistent with a diagnosis of a major psychotic mental disorder. His accusations regarding an alleged FBI agent (Mr. Hodge), his inconsistent/false statements regarding his education and divorce, and his statement he has

"infiltrated" multiple groups of people over many years suggests that his thinking is both tangential and that his psychotic symptoms have been present for an extended period of time. The collateral information available has significant limitations in terms of Mr. Wallace's history. There is no information regarding his past functioning, socially or professionally, any past medical/psychiatric/substance abuse problems or information suggesting whether his current psychotic symptoms have been continuous or are intermittent. I agree with Dr. Tuckman's belief that a full psychiatric assessment of Mr. Wallace would be essential in order to fully evaluate the severity of Mr. Wallace's Judgement and reasoning.

In my opinion, the following information mitigates to the opinion that Mr. Wallace was competent during jury duty.

1. There is no indication to suggest that Mr. Wallace's behavior was consideration unusual or bizarre during his jury duty.

2. Mr. Wallace's concerns regarding the trial suggests he was concerned that others were influenced unduly through fear or bribery and that his decision process was not so affected.

3. Colleteral information suggests that Mr. Wallace's concerns are retrospective, occurring only after the trial was concluded, and nothing during the

time he was on the jury caused him to bring information forward to the court or others.

4. Mr. Wallace stated that he would never use his powers during his political campaign which suggests there are some limitations on the arenas where he believes he either possesses or would be willing to use his powers.

In my opinion, the following information mitigates toward the opinion that Mr. Wallace was not competent during jury duty.

1. Mr. Wallace's symptoms seem most consistent with a schizophrenic illness. These illnesses typically occur initially in young adulthood and either intermittently or continuously, continue throughout a person's life.

2. Mr. Wallace shows no evidence of believing that he is mentally ill which would not allow him to be aware that he was seriously impaired during times that he, in fact, was.

3. Mr. Wallace indicated that he began wondering about the fairness of trial because of other jury members' behavior almost immediately after the trial.

4. Mr. Wallace's symptoms are psychotic in nature, which indicates that he has significant difficulty

in at least some areas in differentiating reality from fantasy.

5. Mr. Wallace's written response that he has no wish to speak of other powers that he may have suggests that there may be more severe problems than are immediately apparent.

I am unable to form an opinion within reasonable medical certainty regarding Mr. Wallace's competency or lack thereof during May 23, 1994 through June 10, 1994. There is not sufficient information in my estimate to reach such an opinion. Critical collateral information that is missing includes either direct inquiry of Mr. Wallace as to his state of mind or observations by others during this time frame. It is possible that questions from the jury to the court could shed some light on Mr. Wallace's state of mind.

In reviewing Dr. Tuckman's letter and affidavit, I cannot disagree with his theoretical assessment of Mr. Wallace's state of mind. It is my opinion, however, that there are alternative theoretical formulations that could suggest Mr. Wallace was competent and without sufficient additional information I do not think an opinion within reasonable certainty can be reached.

_____

Bruce R. Berger, M.D.
BRB/ves

No. 95-1456

Supreme Court, U.S.
FILED
APR 8 1996
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In The

Supreme Court of the United States

October Term, 1995

SPARKY'S WATERFRONT SALOON, INC.,
Petitioner,

-against-

COSMOPOLITAN, INC.; H.E. LOCKHART MANAGEMENT, INC., as Successor in interest by merger of LOCKHART DEVELOPMENT CORP.; ARTHUR WITTY, Individually; ARTHUR WITTY REAL ESTATE; ST. THOMAS HISTORICAL TRUST; DEJONGH ASSOCIATES; ROBERT C. DEJONGH; ARMOUR ENTERPRISES, INC.; TOPA EQUITIES (VI) LTD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS H.E. LOCKHART MANAGEMENT INC., ARTHUR WITTY, Individually and ARTHUR WITTY REAL ESTATE

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QUESTIONS PRESENTED

1. Should the Supreme Court review the trial court's finding that the jury foreman was mentally competent at the time of jury service?

2. Must a court order a juror to undergo a psychiatric examination following a trial, upon the request of a disappointed litigant, when the court has conclusively determined that the juror in question was mentally competent at the time of jury service?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
ARGUMENT	12
CONCLUSION	18

TABLE OF AUTHORITIES

	Page
Clemmons v. Sowders, 34 F.3d 352 (6th Cir. 1994)	16
Sullivan v. Fogg, 613 F.2d 465 (2nd Cir. 1980)	14, 15
Tanner v. United States, 483 U.S. 107 (1987)	12
United States v. Boscia, 573 F.2d 827 (3rd Cir. 1978)	15
United States v. Dioguardi, 492 F.2d 70 (2nd Cir. 1975)	13, 14
United States v. Gilsenan, 949 F.2d 90 (3rd Cir. 1991)	15, 16
United States v. Gray, 47 F.3d 1359 (4th Cir. 1995)	16
United States v. Hall, 989 F.2d 711 (4th Cir. 1993)	13, 16

TABLE OF AUTHORITIES (con't)

	Page
United States v. Pellegrini, 441 F.Supp. 1367 (E.D. Pa. 1977)	15
United States v. Renfro, 825 F.2d 763 (3rd Cir. 1987)	16
United States v. Simone, 14 F.3d 833 (3rd Cir. 1994)	15
United States v. Vargas, 606 F.2d 341 (1st Cir. 1979)	13

In The
SUPREME COURT OF THE UNITED STATES

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SPARKY'S WATERFRONT SALOON, INC.,
Petitioner,

v.

COSMOPOLITAN, INC.; H.E. LOCKHART MANAGEMENT, INC., as Successor in interest by merger of LOCKHART DEVELOPMENT CORP.; ARTHUR WITTY, Individually; ARTHUR WITTY REAL ESTATE; ST. THOMAS HISTORICAL TRUST, INC.; DEJONGH ASSOCIATES; ROBERT C. DEJONGH; ARMOUR ENTERPRISES, INC.; TOPA EQUITIES, (VI) LTD,
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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS H.E. LOCKHART MANAGEMENT, INC., ARTHUR WITTY, Individually, and ARTHUR WITTY REAL ESTATE

STATEMENT OF THE CASE

The incident upon which Petitioner sued Respondents was a fire on the premises of Sparky's Waterfront Saloon ("Sparky's") on September 18, 1989, the day after Hurricane Hugo. (Appendix as filed with the Third Circuit, hereinafter referred to as "App.", A23). The manner in which the fire spread to Sparky's was an issue at trial. The jury found that each of Respondents was negligent, but also found that the Respondents' negligence was not a proximate cause of the damages claimed to have been suffered by Petitioner. (App. A3656-A3660).

Five months after the jury verdict, by ex parte correspondence dated November 11, 1994, counsel for Sparky's informed the trial court that the jury foreman, (hereinafter referred to as "Juror #8"), "saw fit to contact our client in St. Thomas recently and advise our client of certain information involving some of the jurors in this case". (App. A3807-A3808). Sparky's counsel further informed the trial court that he "advised [his] client that it would be appropriate to reduce [Juror #8's] information to a written affidavit to present to the Court." (App. A3707). Accordingly, attached to this correspondence was an "Affidavit" signed by Juror #8 in which certain allegations were made, including the alleged bribery of a juror and vague fears experienced by some of the jurors. (App. A3809-A3810). Following submission of this correspondence and documentation to

the trial court, several subsequent communications took place between the trial court and Sparky's counsel in which Sparky's counsel forwarded additional information allegedly bearing on issues of juror misconduct. (App. A3813-A3826). This information was then provided by the trial court to the U.S. Attorney's Office in St. Thomas, which in turn forwarded it to the Federal Bureau of Investigation ("FBI"). (App. A3830, A3839).

On December 20, 1994, the trial court held a telephone conference during which the trial court advised counsel for Sparky's and Respondents that the FBI had conducted an investigation and concluded that the alleged bribery of a juror was unsubstantiated. (App. A3864-A3865). The trial court further advised that the FBI report also raised what the trial court considered to be a delusional problem with one of the jurors, thus raising the issue of whether Juror #8 was mentally competent to serve on the jury. (App. A3865).

Although the FBI report concluded that the alleged bribery was unfounded, Sparky's orally moved for a new trial and/or further proceedings on the issues of jury tampering, unauthorized jury contact by third persons and the competency of Juror #8. (App. A4018). Respondents entered a standing objection on the record and in writing to further proceedings. (App. A4393, Memoranda of Law at Docket Entries 352, 353, 356, 358). Although the trial court then went so far as to

allow the submission of questions written by Sparky's counsel that were answered under oath by the juror who allegedly took a bribe and another individual allegedly involved, ultimately the court determined that the allegations of jury tampering were unfounded. (App. A4218, A4316, A4317, A4319, A4341, A4281-A4286).

With respect to the competency of Juror #8, the FBI report, which is dated December 1, 1994, states that Juror #8, during an interview on that date, made statements that Respondents Armour, Witty and DeJongh "are powerful business people in the community and members of a 'secret society' he identified as the 'Masons' ". (App. A3840). Juror #8 also made various statements concerning conduct he had observed as a result of his infiltration of Masons meetings. (App. A3845). When asked how he had been able to infiltrate Masons meetings, Juror #8 stated that he "had special powers which enabled him to make himself disappear", to "go through walls and to be able to fly", which he had acquired from "reciting ancient [E]gyptian chants from the book of 'M' ". (App. A3846). Juror #8 also discussed with the FBI agent in detail the facts, legal issues and instructions the jury had received with respect to the trial. (App. A3840-A3844). Juror #8 also later submitted answers to written questions drafted by Sparky's counsel which were consistent with his statements to the FBI agent concerning his powers.

(Petitioner's Petition for Certiorari, hereinafter referred to as "Petition", at P. 57a-64a, App. A4287-A4295).

From the beginning of the post trial proceedings, the trial court stressed the importance of proceeding with "great caution" and the exercise of "very careful, detailed controls" in the area of post verdict inquiry. (App. A3919). The trial court also stated that he had watched Juror #8 "carefully . . . through trial. I saw no problem with him, nor did I hear of any problem raised by anyone connected with the case, counsel, staff or anyone else". (App. A4390). The trial court recognized that Juror #8's fellow jurors had selected him as foreman, and that he asked several intelligent questions during the trial. (App. A4390). The trial court also noted that Juror #8 ran for elected office in November of 1992 and again in November of 1994 without any suggestion of incompetency being raised. (App. A4390, Board of Elections records at Docket Entry 362). The trial court stressed that the final determination of competency was a matter for the trial court, not for an expert. (App. A4389, A4659, A4661).

During the post trial proceedings which, the trial court stated went "way beyond what it would need to do" with respect to its exercise of discretion, (App. A4378), Juror #8 appeared before the trial court on numerous occasions. (App. A4311, A4313, A4347(b), A4359, A4367, A4375, A4387). The trial court, upon Juror #8's request, appointed counsel to represent him.

(App. A4313). The trial court stated that he watched Juror #8 closely during the appearances at the post trial proceedings. (App. A4390, A4519). Sparky's counsel, meanwhile, submitted a report dated December 29, 1994, by a psychiatrist Sparky's hired (App. A3959-A3961) who concluded, in part, that he, "would be seriously concerned about the extent of the contamination of [Juror #8's] thinking by his likely Paranoid Psychosis," but stated that an examination would be essential in order to lead to a more definitive diagnosis and opinion. (App. A3961). Taking all these things into consideration, the trial court stated during a further hearing held on January 13, 1995, that there was no indication that Juror #8 was incompetent during his jury service, and further stated the trial court's intent to terminate the post trial proceedings. (App. A4390-A4392).

Sparky's counsel then stated that Sparky's wanted to go back to its hired expert with the answers Juror #8 had given to the written questions for a follow-up opinion, which the trial court ultimately allowed. (App. A4402). Sparky's counsel then submitted a supplemental report from the psychiatrist Sparky's had hired which now concluded, based on Juror #8's answers to the written questions, that Juror #8 would be incompetent to serve as a juror. (App. A4422-A4430).

Sparky's counsel also began researching Juror #8's answers to both the questions on his juror

questionnaire and the questions he answered in the post trial proceedings, and submitted information to the trial court indicating that Juror #8 had given incorrect information regarding his educational and work experience, as well as information concerning the year of his divorce and whether he or his wife had initiated the divorce. (App. A4432 A4418-A4421, A4498-A4499, A4623, A4624). Based upon this additional information, the trial court indicated it's intention to appoint a psychiatrist to review the matter and to explore whether Juror #8 would voluntarily submit to an examination, although, "it's a close issue as to whether I should do it." (App. A4537-A4539). The trial court further stated that, assuming that he would have the power to order an examination in the event that Juror #8 did not voluntarily agree to do so, he "would not think in this case this Court would be prepared to exercise that power", that to do so would be "going, beyond a reasonable doubt, what I think I should do in terms of exercising discretion", because, "I don't think there is that kind of compelling need here." (App. A4539). The trial court advised that it would take any false statements which Juror #8 allegedly made into account in determining the ultimate issue of competency. (App. A4655).

Juror #8's court-appointed attorney advised the trial court that she would advise Juror #8 not to voluntarily undergo a psychiatric examination because,

based on her research, she saw no basis to overthrow the jury's verdict even if such an examination took place. (App. A4591-A4592). Juror #8, through his counsel, ultimately advised the trial court that he would not voluntarily undergo a psychiatric examination. (App. A4608). The trial court then stated its intention to appoint a psychiatrist and obtain a written opinion from him based upon the information at hand, including Juror #8's statements to the FBI, his written answers to voir dire questions and to the post trial questions propounded, the information obtained by Sparky's concerning the alleged inconsistencies in his voir dire answers, Sparky's expert's opinion, and applicable case law, and on January 20, 1995, entered an Order to that effect. (App. A4616-A4617, A4637-A4638). The trial court also ruled that both sides would have the opportunity to cross-examine the court-appointed psychiatrist. (App. A4616, A4637). The procedure which the trial court followed with respect to the court-appointed psychiatrist was agreed to by Sparky's without any objection being raised. (App. A4537-A4539, A4700-4702).

The report of Dr. Bruce Berger, the court-appointed psychiatrist states, in pertinent part, that there was no direct evidence that Juror #8 was suffering from hallucinations, incoherence, grossly disorganized behavior or significant social occupational dysfunction. (Petition at P. 67a, App. A4674). Dr. Berger also noted

the information provided to him had "significant limitations" for purposes of Juror #8's history from which a determination could be made as to whether Juror #8's current symptoms had been continuous or were intermittent. (Petition at P. 68a, App. A4674). Dr. Berger then listed factors which both mitigated towards, and against, the opinion that Juror #8 was incompetent during his jury service. (Petition at P. 68a-70a, App. A4674-A4675). Dr. Berger also stated that although he, "cannot disagree with [Sparky's expert's] theoretical assessment of [Juror #8's] state of mind", it was Dr. Berger's opinion that, "there are alternative theoretical formulations that could suggest [Juror #8] was competent. . . " (Petition at P. 70a, App. A4675-A4676).

A final hearing on the issue of the alleged mental incompetence of (Juror #8) was held on January 25, 1995, at which counsel for all parties and the trial court had an opportunity to question Dr. Berger concerning his report and his opinion. Dr. Berger reiterated the position he took in his written opinion that, based upon the information provided, he was unable to form a definitive opinion as to whether the juror in question was or was not competent to serve as a juror at the time of his jury service. (App. A4736, A4744, A4749, A4750, A4760, A4764, A4766, A4768, A4780). Dr. Berger repeated his assertion in his written opinion that there were alternative theoretical formulations to suggest

that Juror #8 was competent at the time of his jury service. (App. A4742-A4743.)

At the end of this hearing, the trial court found that Sparky's had not even come close to proving that Juror #8 was incompetent at the time of his jury service under either a clear and convincing standard or a preponderance of the evidence standard. (Petition at P. 8a, App. A4810). Additionally, the trial court stated that a preponderance of the evidence standard was "certainly" the least standard that Sparky's would have to bear. (Petition at P. 10a, App. A4812). The trial court further stated that if Respondents had to prove competency by a preponderance of the evidence standard they had done so. (Petition at P. 10a, App. A4813). The trial court stated that it did not take the opinion of Sparky's expert lightly, but that the trial court was of the opinion that Sparky's expert leapt from a diagnosis of psychotic illness to a conclusion of juror incompetence which was not a leap that Dr. Berger would make. (Petition at P. 8a, App. A4811).

The trial court reiterated its position that, applying applicable case law to the facts of the instant case, the trial court could have exercised its discretion not to have engaged in any post trial inquiry whatsoever. (Petition at P. 4a, App. A4805). The trial court again stressed its own observations of Juror #8 during the trial as well as during the post-trial proceedings, as well as the fact that no juror, court personnel or counsel

reported any odd, bizarre or peculiar behavior on the part of Juror #8. (Petition at P. 12a, App. A4769-A4776, A4815). The trial court found, beyond a reasonable doubt, that, "when the trial ended and [Juror #8] stood up as the foreman, he was clear, he seemed to be under complete control . . ." (Petition at P. 6a-7a, App. A4808). The trial court recognized that it must make the determination of competency, that the standard was whether or not Sparky's had shown incompetency during the relevant time period and that the burden of proof was clearly on Sparky's. (Petition at P. 7a, App. A4808-A4809).

The trial court found "no question" that Juror #8 was not insane, either closely before or during his jury service. (Petition at P. 12a, App. A4816) .The trial court stated that, while Juror #8 might be a liar or a con man, these factors did not add up to insanity. (Petition, at P. 13a, App. A4817). The trial court further found that, whatever problems Juror #8 had, they did not affect his jury service. (Petition at P. 14a, App. A4819). The trial court stated that Sparky's arguments in this regard were not persuasive, and that Sparky's had not proven incompetency by a wide margin. (Petition at P. 14a-15a, App. A4819). Accordingly, the trial court entered an order denying Sparky's motion for a new trial in its entirety. (Petition at P. 18a, App. A4819-A4820).

ARGUMENT

A competent jury heard and decided this case. Sparky's allegation that the jury foreman was incompetent at the time of his jury service is not supported by the evidence. The trial court's inquiry into the matter, including the retention of a court-appointed expert, was thorough and not in error. Sparky's was given repeated opportunities by the trial court to present evidence in support of its position. The trial court correctly determined that the juror in question should not be required to submit to a psychiatric examination, and the trial court applied the proper standards of law both with respect to the form of the inquiry conducted by the trial court and the determination of competency.

A post verdict inquiry into alleged juror incompetence is allowed only when an extremely strong showing of incompetency has been made. Tanner v. United States, 483 U.S. 107, 126 (1987). A litigant's constitutional right to an unimpaired jury is protected by several aspects of the trial process, including voir dire examination, and observations by the court, by counsel and by court personnel. Id., 127. Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court before they render a verdict. Id. In the instant case, no one observed or reported any unusual or inappropriate behavior on the part of Juror #8 during the course of a lengthy trial.

Furthermore, it is well settled that only clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service requires setting aside a verdict. United States v. Dioguardi, 492 F.2d 70, 78 (2nd Cir. 1974), cert. denied, 419 U.S. 873 (1974); United States v. Hall, 989 F.2d 711, 714 (4th Cir. 1993); United States v. Vargas, 606 F.2d 341, 345 (1st Cir. 1979). Only when proof of an adjudication of insanity or mental incompetence closely in advance of the time of jury service, or proof of a closely contemporaneous and independent post trial adjudication of incompetency, have courts conducted hearings to determine whether the disability in fact affected the juror at the time of trial. United States v. Dioguardi, 492 F.2d at 80.

In the instant case, there is no proof of an adjudication of insanity of Juror #8 closely in advance of his jury service or of a closely contemporaneous and independent post trial adjudication of insanity. There is no evidence that Juror #8 was anything other than alert and attentive during his service, nor is there any evidence of any unusual behavior on his part during his service, or that he was incapable of ably serving. Nevertheless, the trial court did conduct lengthy and extensive post trial proceedings. The trial court ultimately found, based on all the evidence as well as its own observations, that Sparky's fell far short of proving the incompetency of Juror #8.

The Second Circuit's opinion in Sullivan v. Fogg, 613 F.2d 465 (2nd Cir. 1980), relies upon the same principles enunciated in Dioguardi, requiring an independent adjudication of incompetency of the juror in question close to the time of jury service. 613 F.2d at 466. However, Sullivan held that a sufficient showing of incompetency had been shown to justify a further inquiry by the trial court, and that the defendant should have had an opportunity to cross-examine a court-appointed psychiatrist concerning the psychiatrist's conclusions about the juror's mental competence. 613 F.2d at 467-468. The Second Circuit in Sullivan did not ultimately hold that the juror at issue was incompetent. In the instant case, the trial judge held an evidentiary hearing which included allowing both sides to cross-examine the court-appointed psychiatrist concerning his conclusions about Juror #8.

Furthermore, the juror whose competence was at issued in Sullivan willingly submitted to an examination. 613 F.2d at 468. Contrary to Petitioner's assertions on Page 12 of its Petition, there is no statement in Sullivan v. Fogg to support Petitioner's claim that a trial judge has the authority to order a juror to undergo a psychiatric examination where the juror has refused to do so voluntarily. Nor does Petitioner cite any authority which holds that a trial judge has the authority to, or under the fact and circumstances of a given case was required to, compel a juror to undergo a

psychiatric examination when the juror has refused to do so voluntarily.

It is well-established that the trial judge has discretion to decide how to deal with a situation in which there is an allegation of jury misconduct. United States v. Simone, 14 F.3d 833, 838 (3rd Cir. 1994). This includes the determination whether to hold a post-trial hearing. Id., citing United States v. Gilsenan, 949 F.2d 90, 96-97 (3rd Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 2971 (1992). In Gilsenan, the Third Circuit stated that "a hearing need not be held at the behest of a party whose allegations if established would not entitle it to relief." 949 F.2d at 97. In the absence of substantial if not wholly conclusive evidence of incompetency, courts have been unwilling to subject a juror to a hearing on his mental condition merely on the allegations and opinions of a losing party. United States v. Pellegrini, 441 F.Supp. 1367, 1370 (E.D.Pa. 1977), aff'd 586 F.2d 836 (3rd Cir. 1978), cert. denied, 439 U.S. 1050 (1978).

Once the trial court has determined that a hearing should be held, the trial judge has discretion in determining the nature and extent of the hearing. United States v. Boscia, 573 F.2d 827, 831 (3rd Cir. 1978), cert. denied, 436 U.S. 911 (1978), reh'g denied, 438 U.S. 908 (1978). This discretion of the trial court includes the form of any hearing to be held where allegations concerning the mental competence of a juror are at issue. Sullivan v. Fogg, 613 F.2d at 468. When the

possibility of juror incompetence comes to the court's attention, but the juror's disability is not obvious, the court is obliged only to conduct some hearing or inquiry. Clemmons v. Sowders, 34 F.3d 352, 355 (6th Cir. 1994).

Competency to sit on a jury is a determination within the broad discretion of the trial court and will be tampered with only upon finding an abuse of that discretion. Id. Likewise, the Fourth Circuit has stated that, "this Court considers a district court's determination of juror competency to be a finding of fact, which will not be overturned absent clear error," United States v. Gray, 47 F.3d 1359, 1366 (4th Cir. 1995), citing its earlier decision in United States v. Hall, 989 F.2d 711, 714 (4th Cir. 1993).

Likewise, the Third Circuit has stated that, in determining the competency of a criminal defendant, the final determination of competence or lack thereof is a finding of fact subject to a clearly erroneous standard of review. United States v. Renfro, 825 F.2d 763, 766, n.4 (3rd Cir. 1987). A district court's order denying a new trial is reviewed to determine whether the court abused its discretion. United States v. Gilsenan, 949 F.2d 90, 95 (3rd Cir. 1991).

In the instant case, no evidence was submitted suggesting that Juror #8 had ever sought or received psychiatric treatment. The sole basis of his alleged incompetence were his statements on a single occasion

to the FBI agent, his answers to the written questions propounded by Sparky's counsel, and the allegations that he falsified various answers.

Moreover, there were lengthy post trial proceedings, the format for which was consented to by Petitioner. These proceedings included giving the parties the opportunity to cross-examine the court-appointed psychiatrist, following which the trial judge concluded that the juror was not incompetent and that no further proceedings were warranted. The court did not find, as asserted by Petitioner on page 6 of its Petition, that Juror #8 was "severely delusional", nor did the trial court find, as asserted by Petitioner in its Question Presented No. 1, that Juror #8 "suffered from a psychotic illness". Rather, the trial court held that Petitioner did not come close to proving, by either a clear or convincing standard or a preponderance of the evidence standard that Juror #8's "mental disease and the like that he may have" and "views and convictions" affected Juror #8's ability to competently serve as a juror. (Petition at P. 11a, 14a).

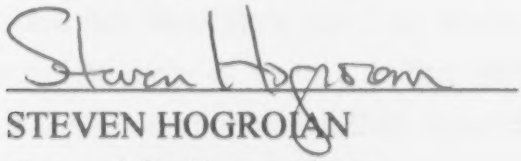
To the contrary, the trial court affirmatively found that this did not affect his jury service. (Petition at P. 14a, App. A4814, A4819). Furthermore, the trial court found that if Respondents had to prove competency by a preponderance of the evidence, they had done so. (Petition at P. 10a, App. A4813).

CONCLUSION

The trial court correctly interpreted and applied applicable law to the issues raised by Petitioner. The trial court carefully and thoroughly investigated and considered the issues raised by Petitioner and conclusively determined that Jury #8 was competent at the time of jury service.

Accordingly, for the forgoing reasons, Respondents H.E. Lockhart Management, Inc., Arthur Witty, Individually, and Arthur Witty Real Estate, respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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April 6, 1996

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Lockhart Companies, Inc. is the parent company of Respondent H.E. Lockhart Management, Inc. There are no nonwholly owned subsidiaries of Respondent H.E. Lockhart Management, Inc.

Supreme Court, U.S.
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APR 10 1996
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No. 95-1456

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SPARKY'S WATERFRONT SALOON, INC.,

Petitioners,

v.

COSMOPOLITAN, INC., H.E. LOCKHART MANAGEMENT, INC., as Successor in interest by merger of LOCKHART DEVELOPMENT CORP.; ARTHUR WITTY, Individually; ARTHUR WITTY REAL ESTATE; ST. THOMAS HISTORICAL TRUST; DEJONGH ASSOCIATES; ROBERT C. DEJONGH; ARMOUR ENTERPRISES, INC; TOPA EQUITIES (VI) LTD.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS, DEJONGH ASSOCIATES & ROBERT C. DEJONGH'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court is required to overturn a jury verdict where although the court found a juror to have held certain views regarding "powers", and was untruthful about his educational background, the court was nonetheless satisfied that the juror carefully listened to the trial testimony, followed the jury instructions, found the facts in accordance with the evidence, was sane, and was otherwise competent during the relevant time period of jury service.

2. Whether a district court has a duty to order a juror to submit to a psychiatric examination against the will of the juror, where the court in its discretion assumed it had the authority but specifically declined to exercise it, where Petitioner failed to object to said ruling and failed to request such examination, and where Petitioner failed even to raise the issue in the district court.

TABLE OF CONTENTS

Page

Table of Authorities iii

Statement of the Case 1

Argument 2

Conclusion 7

TABLE OF AUTHORITIES

Cases Cited **Page**

Tanner v. United States, 483 U.S. 107 (1987) 4
Sullivan v. Fogg, 613 F.2d 465 (2d Cir. 1980) 4
United States v. Hall, 989 F.2d 711, 714 (4th Cir. 1993).... 4
United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974..... 4
Jordan v. Massachusetts, 225 U.S. 167, 173 (1912).....4, 5

Rules Cited

Supreme Court Rules, Rule 15.1 2

STATEMENT OF THE CASE

Petitioner filed suit against respondents in the District Court of the Virgin Islands as a result of a fire which occurred on September 18, 1989. Petitioner claimed that a fire in one building spread across to Petitioner's building by means of a wooden trellis connecting the two buildings. After almost three (3) weeks of trial, a verdict was rendered on June 10, 1994, finding respondents negligent, but finding also that their negligence did not proximately cause the fire damage to Petitioner's building.

Almost six (6) months after the verdict, and almost four (4) months after the denial of post-trial motions, Petitioner informed the district court about jury tampering allegations made by the jury foreman[1] to Petitioner. Through use of an FBI agent, the court investigated the matter at which time questions about the mental competency of the same juror arose. The court thereafter conducted extensive and numerous hearings with all counsel present, allowed Petitioner to submit the findings of its own psychiatrist, met with the juror and his court-appointed counsel, allowed Petitioner to submit certain written questions to the juror, required the juror to submit sworn answers thereto, retained a psychiatrist to review all available records, and allowed cross examination of the court-appointed psychiatrist. The juror declined to submit to a psychiatric examination by the court-appointed psychiatrist.

The court ultimately found no evidence of jury tampering or that the jury foreman was anything other than mentally competent to understand the trial proceedings, to deliberate dispassionately on the evidence, and to render an impartial verdict at the conclusion of the case.

Petitioner appealed all the lower court rulings to the U.S. Court of Appeals for the Third Circuit which after hearing oral

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[1] The juror in question will be referred to herein as "juror #8".

argument on December 4, 1995, issued a five (5) line Judgment Order affirming each and every contention raised by Petitioner. (Petitioner's App., 1a-2a). This unanimous Judgment Order dated December 8, 1995, has not been published nor reported. Petitioner is not challenging any rulings except those relating to the mental competency of the juror.

ARGUMENT

The Court should not accept certiorari jurisdiction because the Third Circuit Court of Appeals' five (5) line decision as well as the district court's rulings are not in conflict with the legal standards for evaluating juror competency as historically recognized by this Court. Nor is there any conflict with any other decisions of the various circuits that needs to be rectified by this Court.

Rule 15.1 of the Supreme Court Rules admonishes counsel that they have an obligation to the Court to point out any perceived misstatements of fact or law set forth in the Petition "which have a bearing on the question of what issues would properly be before the Court if certiorari were granted". Petitioner has in several instances misstated the facts in seeking to obtain a writ of certiorari.

Petitioner contends that the district court found the juror in question to suffer from a psychotic illness, to be irrational, and to have been delusional at the time of the trial yet nonetheless determined the juror competent to sit as a juror. (Petition For Writ of Certiorari at i, 7, 10). Besides finding the juror mentally competent, the court made no such findings as recited by Petitioner. In fact, the court-appointed psychiatrist, Dr. Bruce Berger made no diagnosis that the juror was either schizophrenic or suffering from a major psychotic mental

disorder (R.A4749).[2] While Petitioner includes Dr. Berger's written report in APPENDIX K, Petitioner for obvious reasons has failed to include any cross-examination by counsel and the court of Dr. Berger.

Dr. Bruce Berger was unable to form an opinion within reasonable medical certainty whether juror #8 was incompetent during his jury service. (Petitioner's App., 70a). This finding was reached notwithstanding the peculiar beliefs and powers of the juror, and the untruthful responses about his educational background. Specifically, Dr. Berger noted that juror #8 was not suffering from hallucinations, incoherence, grossly disorganized behavior or significant social/occupational dysfunction. (Petitioner's App., 67a). Moreover, he found "no indication or suggestion that [juror #8's] behavior was consideration (sic) unusual or bizarre during his jury duty". (Petitioner's App., 68a).

Petitioner further contends that the district court determined it had no power to order the juror to undergo a psychiatric examination, and thereby "cut the process short" by simply delivering written materials to Dr. Berger without compelling such an examination (Petition For Writ of Certiorari at 6, 13). The truth of the matter is to the contrary. As stated by the district court—

> "This court took that issue up with all counsel that it had grave doubts as to whether it had the power to require [juror #8] to subject himself to psychiatric examination, but that if the Court had the discretionary power it did not expect to exercise it." (Emphasis Supplied). (R.A4701).

Moreover, the district court specifically found that no counsel, (including counsel for Petitioner) objected or reserved any right

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[2] Throughout this Opposition, the notation "R.___ shall be used to denote references to the Appendix filed with the Third Circuit.

to request such an examination, either before or after Dr. Berger rendered his findings. (R.A4700-4703). The very first time Petitioner raised this issue was before the Third Circuit Court of Appeals.

Since the court believed it had the power to order such an examination, but specifically decided not to exercise it, there is no need for the U.S. Supreme Court, on Petitioner's behalf, to rule if and when a district court has the power to order a psychiatric examination.

There exists no compelling reason for certiorari to be granted on these issues. The district court carefully considered the standards of mental competency applicable to jurors in Tanner v. United States, 483 U.S. 107 (1987), United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974) and Sullivan v. Fogg, 613 F.2d 465 (2d Cir. 1980), and determined carefully that the proper standard was whether the juror was mentally competent at the time of jury service. (Petitioner's App., 7a). Likewise, the district court held that the burden of proof of establishing incompetence is with the plaintiff to prove either by a preponderance of the evidence or by clear and convincing evidence.

The court grappled with the definition of what is juror competency. (Petitioner's App., 42a, 52a). In considering that issue, the district court looked for guidance to United States v. Hall, 989 F.2d 711, 714 (4th Cir. 1993) for the holding that a jury's verdict must be set aside "if the defendant presents clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service." (Petitioner's App., 40a). See, also Dioguardi, supra at 78.

Petitioner finds fault with the test for juror competency utilized by the district court because "it never set forth with any precision the criteria that should be used to determine whether a juror was mentally competent to sit at trial", i.e. whether the juror was able "to arrive at a rational conclusion", citing Jordan

v. Massachusetts, 225 U.S. 167, 173 (1912). (Petition for Writ of Certiorari at 9, 10). This is a frivolous argument for several reasons.

First of all, the district court exhaustively reviewed the relevant case law, and applied that law to the facts sub judice. In none of those cases is there cited any specific "criteria to be used", in determining whether a juror was mentally competent, or able to arrive at a rational conclusion. None of those cases has been overturned because of any lack of specific criteria used. Nor has Petitioner ever suggested what the criteria ought to be.

It seems axiomatic that each case must be evaluated on its own facts, and that there cannot be a litmus test of competency applicable to all cases. However, Petitioner conveniently overlooks the many factors considered by the district court in finding, using its own criteria, that juror #8 was mentally competent notwithstanding his peculiar beliefs and powers. These factors were clearly and amply set out by the district court throughout the extensive hearings held on this matter.

As stated by the district court, it watched the juror "carefully" throughout several weeks of trial and on two occasions in chambers during the competency proceedings. (Petitioner's App., 12a, 43a). It observed the juror pose intelligent questions about two counsel who were brothers in the same case and observed the juror's reaction, observed the juror stand up as jury foreperson and render the verdict, and in each situation, juror #8 "seemed to be under complete control". (Petitioner's App., 4a, 12a). The fact that the juror was chosen as the jury foreperson, ran for elected office, and seemed to be a very intelligent person also convinced the court that the juror was mentally competent at all relevant times. (Petitioner's App., 30a, 31a)

The district court further determined that there was no evidence that during his jury service, any of the juror's peculiar

beliefs and powers in any way were expressed by him or alluded to in any way, (Petitioner's App., 29a), or that the juror's problems affected his jury service or in any way dominated or influenced him in the jury room or courtroom. (Petitioner's App., 14a, 41a). In its view, the juror determined the facts of the case after carefully listening to and following the court's jury instructions, and applying the law to the facts. (Petitioner's App., 14a). Moreover the court saw no problems with the juror during jury service, nor did it hear of any problems about juror #8 raised by anyone associated with the case including court-personnel or other jurors. (Petitioner's App., 30a).

The district court found juror #8 to be mentally competent "by a wide margin". (Petitioner's App., 15a). Finding not only that the juror could operate normally in life, could handle his own bank account, and could assume other duties in life, the court stated that it would be "frivolous" for anyone to argue that the juror should be institutionalized, adjudged incompetent or denied the right to vote (Petitioner's App., 12a, 13a, 30a). The court therefore had no difficulty in finding that the juror was not a man who was insane either closely before, during or closely after service as a juror. (Petitioner's App., 12a).

Based on the foregoing, it is indeed difficult to comprehend how Petitioner can seriously argue that the district court "overlooked" the question whether juror #8 was able to arrive at a rational conclusion, or whether juror #8 could understand the issues or could deliberate at the time of service. The court fully analyzed the standards enunciated in the applicable case law, and followed the correct standard all the while protecting Petitioner's due process rights. It is equally incomprehensible to argue as Petitioner has, that the district court should have compelled juror #8 to undergo a psychiatric examination against his will. The district court in its discretion correctly declined to take that drastic step.

To petition this Court for a writ of certiorari to give "guidance" in an area where the district court has already and adequately set forth its own criteria for deciding whether a juror was mentally competent, and to instruct district courts that they have the power to order psychiatric examinations, where this district court has not claimed it lacks such power, invites an advisory opinion from this Court where none is required.

CONCLUSION

For the district court to ultimately hold that Petitioner failed to prove by any civil standard of proof that juror #8 was mentally incompetent, was a considered finding reached after a thorough consideration of existing case law, common sense, and the facts of this case. There is no conflict among the circuit courts or even among the district courts on the matter of the standard for juror competency necessitating any involvement by the U.S. Supreme Court. There is also no need for this Court to address when and under what circumstances a court should order a psychiatric examination against the will of a juror. For these reasons, the Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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